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No. 2504

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A CORPORATION,

Plaintiff in Error,

VS.

JOHN A. PARKER,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the District Court of the
United States for the District of Oregon.

RECEIVED

OCT 19 1914

F. D. MONCKTON,
CLERK

Filed

OCT 26 1914

F. D. Monckton,
Clerk.

No. _____

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*United States Circuit Court of Appeals, for the Ninth
Circuit.*

C. A. SMITH LUMBER and MANUFACTURING
COMPANY, A Corporation,

Plaintiff in Error.

vs.

JOHN A. PARKER,

Defendant in Error.

Names and Addresses of the Attorneys of Record.

JOHN D. GOSS, Marshfield, Oregon, for the Plain-
tiff in Error.

WM. T. STOLL, Marshfield, Oregon, and ISHAM
N. SMITH, Mohawk Building, Portland, Ore-
gon, for the Defendant in Error.

In the District Court of the United States, for the District of Oregon.

JOHN A. PARKER,

Plaintiff.

vs.

C. A. SMITH LUMBER and MANUFACTURING
COMPANY, A Corporation.

Defendant.

Citation.

United States of America,—ss.

The President of the United States, to John A.
Parker.

Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco in the state of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office in the district court of the United States for the district of Oregon, wherein you are plaintiff and defendant in error, and the C. A. Smith Lumber and Manufacturing Company is defendant and plaintiff in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

2 *C. A. Smith Lumber & Mfg. Company.*

Witness, the Honorable Robert S. Bean, Judge of the United States District Court, in and for the district of Oregon, this 28th day of August, 1914.

R. S. BEAN,
District Judge.

Service of the within Citation and receipt of a copy thereof, admitted, this 31st day of August, 1914.

WM. T. STOLL,
Attorney for John A.
Parker, Plaintiff in
Lower Court, and
Defendant in Error.

Filed September 4, 1914. G. H. Marsh, Clerk.

Writ of Error.

In the Circuit Court of Appeals for the Ninth Circuit.

C. A. SMITH LUMBER and MANUFACTURING
COMPANY, A Corporation,
Plaintiff in Error.

vs.

JOHN A. PARKER,

Defendant in Error.

United States of America,—ss.

The President of the United States to the Judge of the District Court of the United States, for the District of Oregon,

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between John A. Parker, Plaintiff and Defendant in Error, and C. A. Smith Lumber and Manufacturing Company, a corporation, Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the law and customs of the United States should be done.

4 *C. A. Smith Lumber & Mfg. Company.*

Witness the Honorable Edward Douglas White,
Chief Justice of the Supreme Court of the United
States this 28th day of August, 1914.

G. H. Marsh, Clerk of the District Court of the
United States for the District of Oregon.

[Seal, U. S. District Court,
District of Oregon.]

State of Oregon,
County of Coos,—ss

I, Herbert S. Murphy, being first duly sworn, on
oath depose and say that I am upwards of twenty-
one years of age; that on the 8th day of September,
1914, at Marshfield, Coos County, Oregon, I served
the within writ of error on William T. Stoll, the
attorney for John A. Parker, defendant in error,
by delivering and leaving with Miss Elvira Frizeen,
clerk and stenographer for said William T. Stoll,
at his office in the First National Bank Building,
Marshfield, Oregon, a true copy thereof.

Subscribed and sworn to before me this the 8th day
September, 1914.

[Seal]

EVELYN JOHNSON,
Notary Public for Oregon.

Filed August 28, 1914. G. H. Marsh, Clerk,
United States District Court, District of Oregon.

*In the District Court of the United States for the
District of Oregon.*

November Term 1913.

Be it remembered, that on the 27th day of December 1913, there was duly filed in the District Court of the United States for the District of Oregon, a Transcript of Record from the Circuit Court of the State of Oregon for Multnomah County, in words and figures as follows, to wit:

Transcript on Removal.

*In the Circuit Court of the State of Oregon, for the County
of Multnomah.*

Complaint.

JOHN A. PARKER,

Plaintiff.

vs.

C. A. SMITH LUMBER and MANUFACTURING
COMPANY, A Corporation,

Defendant.

The plaintiff for a cause of action against the defendant alleges that:

1. The defendant is now, and was at all times herein mentioned, a corporation, duly created under the laws of the State of Minnesota, and authorized to do business within the State of Oregon, having

complied with the laws of the State of Oregon, with reference to foreign corporations desiring to do business therein and was, and still is, operating two large saw-mills on Coos Bay, near the City of Marshfield, Coos County, Oregon.

2. The plaintiff at the times herein mentioned, was a skilled mill-wright, having served his apprenticeship with a master mill-wright as such continuously from his thirteenth year to his twentieth year, and thereafter following his trade or occupation of mill-wrighting in Canada and at different places in the United States for the period of more than six years, until receiving the injuries hereinafter mentioned.

3. In the month of December, 1908, plaintiff was in the employ of the defendant, at its saw-mill called the C. A. Smith mill, as a mill-wright, earning and capable of earning and receiving Thirty-five cents per hour; and as a part of the contract of employment between plaintiff and defendant, it was provided that the defendant should, and thereafter it did, retain out of plaintiff's earnings One Dollar per month, for medical and hospital charges, for which the defendant agreed to furnish the plaintiff, during his employment by it, with medical and surgical services of physicians and surgeons, and hospital care and attendance that might be necessary, on account of any sickness, disease or accident, resulting or contracted by the plaintiff while in the defendant's employ.

4. On December —, 1908, while the plaintiff was so engaged in the performance of his duties as a mill-wright, he was injured in his left leg, which injury he attributed to the negligence and carelessness of the defendant, and so notified the defendant and its officers; whereupon, pursuant to his contract of employment, as aforesaid, the defendant's physician and surgeon was called to attend and treat him, and thereupon treated him in a negligent, careless and unskillful manner, so that as a result thereof he became infected with blood-poisoning; and thereafter, and as a result of such injury, and such negligent treatment of defendant's physician and surgeon, on the 6th day of February, 1909 plaintiff was required to have his entire right hand amputated.

5. On account of the matters and things contained in the last two paragraphs, the plaintiff claimed to have a cause of action against the defendant for damages, for the loss of his hand and the humiliation of being a cripple resulting therefrom, for the pain and suffering incident to such sickness, and for loss of time, all due, as he claimed and charged, to the fault and negligence of the defendant.

6. In the month of May, 1909, the defendant made and entered into an agreement with the plaintiff, by the terms of which the plaintiff signed a release in writing, discharging the defendant from all liability on account of the said accident, and all liability of the defendant arising therefrom, the defendant then and there paying the plaintiff Two Hundred Dollars in cash, and agreeing orally

with the plaintiff, as a further consideration for such release, to give him employment so long as he wanted it, at any work in the defendant's said mills, that the plaintiff could do, that is to say, to measure lumber in the yard, or to operate a trimmer, or to act as time-keeper, or to look after the stores, and would pay the plaintiff therefor the going wages, i. e. the same wages as was paid to other men for the same services, which agreement was assented to by the plaintiff, and defendant in all particulars, and was accepted by the plaintiff in satisfaction and discharge of his said cause of action.

7. Thereupon and pursuant to such agreement, the plaintiff entered the employ of the defendant, filling a number of different positions for the period of about eight months, whereupon he was permanently put in charge of a trimmer, which is an automatic machine that trims up all the board lumber that goes through the mill, and which is a machine that can be operated by a man with one hand, and continued in that position continuously until the 31st day of January, 1913, and the plaintiff otherwise well and truly performed all of the conditions of the said contract upon his part, to the satisfaction of the defendant and its officers. The going wages paid by the plaintiff to trimmers, that is to say, operating the machine heretofore described as a trimmer, was, and still is, Three and 50-100 Dollars per day; and plaintiff was capable, at the time of his discharge, and still is capable, of running such trimmer, and of earning the wages paid to a trimmer. He was

at all such times, and still is, capable of acting as a time-keeper, or of looking after the stores, and was, and still is, capable of measuring lumber in the yards; and was, and still is, capable of earning the wages paid to men for those several employments, Three and 50-100 Dollars per day.

8. At all of the times herein mentioned, the defendant was, and still is, running its saw-mills, employing men to measure lumber in the yards, as time-keepers, as trimmers, and to look after their stores, but although the plaintiff was ready and willing and able, and has ever since been ready and willing and able to perform either of the services theretofore performed by him, or any other services exacted of him by the defendant, the defendant, on the 31st day of January, 1913, in violation of its said agreement with the plaintiff, and without any cause whatsoever, unlawfully and fraudulently discharged the plaintiff, and has ever since and still refuses, to give him employment of any kind, or to otherwise in any manner perform their said contract with the plaintiff.

9. The plaintiff is thirty-one years of age, and has a natural expectancy of thirty-nine years more of life; he is a mechanic and has no means of earning a livelihood except with his hands; he has no employment, and on account of his crippled condition is unable to procure employment.

10. By reason of the breach of defendant's contract with the plaintiff, i. e. the unlawful acts here-

inbefore set forth, plaintiff has been damaged in the sum of Thirty Thousand Dollars.

WHEREFORE, the plaintiff prays judgment against the defendant for the sum of Thirty Thousand Dollars, and the costs and disbursements of this action.

ISHAM N. SMITH,
Attorney for Plaintiff.
Portland, Oregon.

State of Oregon,
County of Multnomah,—ss.

I, Isham N. Smith, being duly sworn on my oath say, I am the attorney for the plaintiff in the above entitled action; I have read the foregoing complaint, know the contents thereof, and believe the same to be true. I make this affidavit because and for the reason that the plaintiff is not at this time within this county.

ISHAM N. SMITH.

Subscribed and sworn to before me this 31st day of October, 1913.

[Seal]

M. A. HINES,

Notary Public for Oregon.

[Endorsed] Filed Oct. 31, 1913. Jno. B. Coffey,
Clerk, by T. S. Wells Deputy.

SUMMONS

In the Circuit Court of the State of Oregon for the County of Multnomah.

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY,

Defendant,

To C. A. Smith Lumber & Manufacturing Company:

In the Name of the State of Oregon; you are hereby required to appear and answer the complaint filed against you in the above entitled suit within ten days from the date of the service of this summons upon you, if served within this county, or if served within any other County of the State, then within twenty days from the date of the service of this summons upon you; and if you fail to answer for want thereof, the plaintiff will take judgment against you for the sum of Thirty Thousand (\$30,000.00) Dollars and costs.

ISHAM N. SMITH,
Attorney for Plaintiff.

State of Oregon,
County of Coos,—ss.

I, W. W. Gage, Sheriff of said State and County, do hereby certify that I served the within Summons within said State and County, on the 12th day of November, 1913, on the within named defendant C. A. Smith Lumber & Manufacturing Company by personally delivering a copy thereof prepared and certified to by Isham N. Smith, one of the Attorneys for the plaintiff, together with a copy of the complaint prepared and certified to by Isham N. Smith, one of attorneys for the plaintiff, to David Nelson, Managing Agent of the defendant C. A. Smith Lumber & Manufacturing Company personally and in person.

W. W. GAGE,
Sheriff of Coos County,
State of Oregon.

Received Nov. 3, 1913. W. W. Gage, Sheriff,
By C. A. Gage, Deputy. [Endorsed]

Filed Nov. 17, 1913,

Jno. B. Coffey, Clerk,

By T. S. Wells, Deputy.

NOTICE OF PETITION.

*In the Circuit Court of the State of Oregon in and for
the County of Multnomah.*

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation,

Defendant.

To John A. Parker, plaintiff above named, and to
W. T. Stoll, his attorney,

You will please take notice that a Petition for Removal of the above entitled cause to the District Court of the United States for the District of Oregon, on behalf of the defendant, the C. A. Smith Lumber & Manufacturing Company, a corporation, together with the bond for removal required by law, copies of which said Petition and Bond are made a part hereof, and herewith served upon you, will be filed in the above named Court and cause on the 1st day of December, 1913.

JOHN D. GOSS,

J. C. KENDALL,

Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

Service of the within notice is hereby accepted in Multnomah County, Oregon, this 1st day of December, 1913, by receiving a copy thereof, duly certified to as such, by John D. Goss, Rights reserved.

Attorney for Dft.

I. N. SMITH,
Attorney for Pltf.

[ENDORSED]

Filed Dec. 1, 1913,

Jno. B. Coffey, Clerk,

By T. S. Wells, Deputy.

PETITION FOR REMOVAL.

*In the Circuit Court of the State of Oregon in and for
the County of Multnomah.*

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation,

Defendant.

To the Honorable Circuit Court of the State of Oregon in and for the County of Multnomah:

Your petitioner, the C. A. Smith Lumber and Manufacturing Company, respectfully shows:

1. That your petitioner is a party to the above

entitled action, and is the sole defendant therein, and said action as appears from the complaint on file therein is of a civil nature and is brought by the plaintiff in the above entitled court for the recovery of damages in the sum of Thirty Thousand (\$30,000.00) Dollars for an alleged violation of a contract alleged in said complaint to have existed between the plaintiff and defendant.

2. That there is in said action a controversy between the plaintiff and your petitioner in which the matter in dispute exceeds exclusive of interests and costs the sum or value of Thirty Thousand (\$30,000.00) Dollars so demanded in said complaint.

3. That the said plaintiff in said complaint claims in substance that by the express terms of an agreement entered into in the City of Marshfield in the month of May, A. D. 1909, the said defendant promised and agreed in consideration of the discharge and release of an alleged liability due on account of an injury to the said plaintiff, that the defendant would give the plaintiff employment as long as he desired it in the sawmills of said defendant, and also paid to said plaintiff the sum of Two Hundred (\$200.00) Dollars.

4. That the above entitled action is now pending in the Circuit Court of the State of Oregon in and for the County of Multnomah, and no proceedings have been taken by your petitioner therein other than entering and filing of this petition and bond for removal in said cause.

5. That at the time of the commencement of the said action, your petitioner, C. A. Smith Lumber

and Manufacturing Company was, ever since has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and it is a citizen and resident of the State of Minnesota, and at all times mentioned was, and now is, a non-resident of the State of Oregon.

6. That the plaintiff above named in said cause of action was at the time of the commencement of said action and at all times herein mentioned, and now is, a citizen and resident of the State of Oregon.

7. That in this action there is a controversy wholly between citizens of different states, and which can be fully determined as between them, that is to say, between said plaintiff John A. Parker, a citizen of the State of Oregon, on the one hand, and the C. A. Smith Lumber and Manufacturing Company, a corporation, a citizen of the State of Minnesota the other, and your petitioner is actually interested therein as appears from said complaint.

8. That service of summons herein was made upon your petitioner in the County of Coos, State of Oregon, and not otherwise or upon any other person; that said service was made on the 12th day of November, 1913; that your petitioner at the time of the service of summons was not and is not required by the laws of the State of Oregon, or the rules of this court to answer or plead to the complaint of this plaintiff prior to a date subsequent to the date on which this petition is filed.

9. That no special bail was or is required in said action.

10. That your petitioner offers herewith its bond,

with good and sufficient surety in the penal sum of \$1,000.00 for its entering in said District Court of the United States in and for the District of Oregon within thirty days from the date of filing of this petition, a certified copy of the record in such action and for paying of all costs that may be awarded by the said District Court of the United States if said Court shall hold said action was wrongfully or improperly removed thereto.

WHEREFORE, Your petitioner prays this Honorable Court to proceed no further herein, excepting to accept said bond as sufficient, to make its said order for the removal of said cause as required by law, and to cause the record herein to be removed into said District Court of the United States, in and for the District of Oregon, and for such other and further order as may be proper.

Dated this 20th day of November, 1913.

C. A. SMITH LUMBER and
MANUFACTURING COMPANY
By DAVID NELSON, Cashier.

JOHN D. GOSS,
J. C. KENDALL,
Attorneys for Defendant.

State of Oregon,
County of Coos,—ss.

I, David Nelson, being first duly sworn, on oath depose and say: That I am the duly appointed Cashier of the C. A. Smith Lumber and Manufacturing Company, defendant herein, that I make this affidavit on its

18 *C. A Smith Lumber & Mfg. Company.*

behalf, and that I have read the foregoing petition,
know the contents thereof, and that the same is true
as I verily believe.

DAVID NELSON,

Subscribed and sworn to before me this 20th day
of November, 1913.

[Notarial Seal]

EVELYN JOHNSON,
Notary Public for Oregon.

State of Oregon,
County of Multnomah,—ss.

Due service of the within petition for removal
is hereby accepted in Multnomah County, Oregon,
this 1st day of December, 1913, by receiving a copy
thereof, duly certified to as such by John D. Goss,
attorney for dft. Rights reserved.

I. N. SMITH,
Attorney for Pltff.

[Endorsed [

Filed December 1, 1913.

JNO. B. COFFEY,
Clerk.
By T. S. Wells,
Deputy.

Bond on Removal

*In the Circuit Court of the State of Oregon in and for
the County of Multnomah.*

JOHN A. PARKER,

Plaintiff.

vs.

C. A. SMITH LUMBER and MANUFACTURING
COMPANY, A Corporation,

Defendant.

Know All Men By These Presents: That we, the C. A. Smith Lumber and Manufacturing Company, a corporation, organized and existing under and by virtue of the laws of the State of Minnesota, as principal, and David Nelson, as surety, are held and firmly bound unto the above named plaintiff John A. Parker, in the sum of One Thousand (1,000.00) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made to the said obligee, we bind ourselves, our, and each of our heirs, administrators, and successors, jointly and severally by these presents:

Witness our hands and seals this the 20th day of November, 1913.

The Condition of the foregoing obligation is such that Whereas the said C. A. Smith Lumber and Manufacturing Company has petitioned the Circuit Court of the State of Oregon, in and for the County of

Multnomah, for the removal to the District Court of the United States in and for the District of Oregon, of a certain cause, action, or proceeding, therein pending, and wherein John A. Parker is plaintiff and wherein C. A. Smith Lumber and Manufacturing Company, a corporation of the State of Minnesota is defendant;

Now Therefore, If the said C. A. Smith Lumber and Manufacturing Company, said petitioner, shall enter in said District Court of the United States in and for the District of Oregon within thirty days from the filing of said petition for removal in this court, a certified copy of the record in said cause, action, or proceeding, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said court shall hold that said cause, action, or proceeding was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

C. A. SMITH LUMBER and
MANUFACTURING COMPANY,

By DAVID NELSON, Cashier, [Seal]
Principal.

DAVID NELSON, [Seal]
Surety.

State of Oregon,
County of Coos,—ss.

I, David Nelson, surety named in the above bond, being first duly sworn, on oath depose and say that I am a resident and freeholder within the State of Oregon, and am worth the sum of Three Thousand (3,000.00) Dollars over and above all my just debts and liabilities, and exclusive of property exempt from execution or forced sale.

DAVID NELSON.

Subscribed and sworn to before me this the 20th day of November, 1913.

[Notarial Seal]

EVELYN JOHNSON,
Notary Public for Oregon.

State of Oregon,
County of Multnomah,—ss.

Due service of the within Bond is hereby accepted in Multnomah County, Oregon, this 1st day of December, 1913, by receiving a copy thereof, duly certified to as such, by John D. Goss, Attorney for dft.
Rights reserved.

I. N. SMITH,
Attorney for.....

[Endorsed] Filed Dec. 1, 1913,

JNO. B. COFFEY,
Clerk.
By T. S. Wells,
Deputy.

Order for Removal.

Be It Remembered, That at a regular term of the Circuit Court of the State of Oregon, for the County of Multnomah, begun and held at the County Court House in the City of Portland, in the said County and State on Monday, the 1st day of December, A. D. 1913, the same being the First Monday in said month, and the time fixed by law for holding a regular term of said Court.

Present, Hons. JOHN P. KAVANAUGH, ROBERT G. MORROW, HENRY E. MCGINN, GEO. N. DAVIS, WILLIAM N. GATENS, and T. J. CLEETON, Judges.

Whereupon, on this Tuesday, the 23rd day of December A. D. 1913, the same being the 20th Judicial day of said term of said Court, among other proceedings the following was had, to wit:

No. D 8127.

Dept. No. 1.

*In the Circuit Court of the State of Oregon in and for
The County of Multnomah.*

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation,

Defendant.

The above named defendant, having on December 1, 1913, filed herein its petition praying the above

entitled Court for an order for the removal of the above entitled cause and to cause the record herein to be removed into the District Court of the United States in and for the District of Oregon, and,

IT APPEARING TO THE COURT that said defendant is the sole defendant to the above entitled cause, that said action is of a civil nature and is brought for the recovery of damages in the sum of Thirty Thousand Dollars (\$30,000.00), and that said sum is in controversy in said action between the plaintiff and the said defendant, that no proceedings have been taken in said action other than filing the said petition and a bond in the penal sum of One Thousand Dollars (\$1,000.00) for the removal of said cause, and,

IT FURTHER APPEARING TO THE COURT that said defendant at the time of the commencement of said action was, ever since has been and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Minnesota, and that it is a citizen and resident of the State of Minnesota and at all times mentioned was and now is a nonresident of the State of Oregon; and that during all of said times the plaintiff was and now is a citizen and resident of the State of Oregon; and that the aforesaid bond has been duly accepted and approved; and,

IT FURTHER APPEARING TO THE COURT that all of the representations set forth in said petition for removal are true;

IT IS NOW, THEREFORE, ORDERED AND ADJUDGED that the above entitled cause be removed from the Circuit Court for Multnomah County,

Oregon, and that said cause and the record herein be removed into the District Court of the United States in and for the District of Oregon, and that the clerk of this court be and he hereby is directed to certify said record in accordance with law and the practice of this court.

Dated this 23rd day of December, 1913.

[Sgd]

J. P. KAVANAUGH,

Judge.

Clerk's Certificate to Transcript on Removal.

*In the Circuit Court of the State of Oregon in and for
The County of Multnomah.*

State of Oregon,
County of Multnomah,—ss.

I, Jno. B. Coffey, County Clerk and Ex-Officio Clerk of the Circuit Court of the State of Oregon in and for the County of Multnomah, do hereby certify that the foregoing copies of Pleadings, Papers, Orders and Journal Entries constituting the entire record together with the Notice of Removal and Undertaking on Removal in the case of John A. Parker, Plaintiff, vs. C. A. Smith Lumber & Manufacturing Company, a corporation, Defendant, have been by me compared with the originals thereof, and that they are true and correct transcripts of such original Pleadings, Papers, Orders, Journal Entries. Notice of Removal and Undertaking on Removal as the same appear of record and on file at my office and in my custody.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Circuit Court the 23rd day of December, 1913.

[Seal]

JNO. B. COFFEY,
Clerk.

By J. H. Bush,
Deputy.

Transcript filed December 27, 1913. A. M. Cannon,
Clerk.

And afterwards, to wit, on the 26th day of January, 1914, there was duly filed in said court, a Demurrer to Complaint, in words and figures as follows, to wit:

Demurrer.

In the District Court of the United States for the District of Oregon.

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation,

Defendant.

Comes now the defendant above named and demurs to the complaint in the above entitled action on the ground that it appears upon the face thereof that the same does not state facts sufficient to constitute a cause of action against the defendant and particularly in that:

1st, The same is contrary to the Statutes of the State of Oregon and particularly to Section 808 of

Lord's Oregon Laws,—Commonly called The Statute of Frauds,—in that it is based upon a purported promise of the defendant to answer for the debt, default or miscarriage of another, which said agreement appears in said complaint to have been entirely oral and not to have been in writing nor subscribed by the party to be charged nor by his lawfully authorized agent.

2nd, The same is contrary to said Statute in that it is based upon a purported oral agreement of the defendant which by the terms thereof was not to be performed within a year from the making thereof.

3rd, The same is contrary to the Statutes of the State of Oregon and particularly to Section 713 of Lord's Oregon Laws, and is an attempt to vary the terms of a written instrument by parole.

JOHN D. GOSS,
Attorney for Defendant.

State of Oregon,
County of Coos,—ss.

I, John D. Goss, the attorney for the defendant in the foregoing entitled action hereby certify that I served the foregoing Demurrer upon Isham N. Smith, attorney for the plaintiff therein on the 24th day of January A. D. 1914, at Marshfield, Coos County, Oregon, by then and there depositing a copy thereof duly certified to by me to be a correct copy thereof, in the U. S. post office at said place, duly addressed to him at his residence and P. O. Address at Portland,

Oregon, (enclosed in a sealed envelope, with the postage thereon fully prepaid.)

JOHN D. GOSS,

Attorney for Defendant.

Filed January 26, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 2nd day of February, 1914, there was duly filed in said Court, a Stipulation in words and figures as follows, to wit:

Stipulation.

*In the District Court of the United States in and for
the District of Oregon.*

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation,

Defendant.

It is hereby stipulated by and between the parties to the above entitled action and their respective attorneys that the Release in writing signed by the plaintiff and mentioned in paragraph numbered "6" on Page 2 of the Complaint herein, is in the words and figures following:

"For the sole consideration of the sum of Four Hundred Ten 75-100 Dollars, this 25th day of Sept. 1909, received from C. A. Smith Lumber & Mfg. Co., I do hereby acknowledge full satisfaction and

discharge of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 16th day of December, 1908 while in the employment of the above.

\$410 75-100

Signed J. A. PARKER, [Seal]
Witness, ARNO MERREEN,
Marshfield, Ore.

Witness, DAVID NELSON,
Marshfield, Ore.”

and, for the purposed of the Demurrer of the defendant to the complaint herein, this shall be taken as having been set out in said complaint as a part thereof.

WM. T. STOLL,
I. N. SMITH,
Attorney for Plaintiff,
JOHN D. GOSS,
Attorney for Defendant.

Filed February 2, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on Monday, the 9th day of March 1914, the same being the 7th Judicial day of the Regular March, 1914, Term of said Court; Present: the Honorable ROBERT S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

No. 6240.

March 9, 1914.

Order Overruling Demurrer.

In the District Court of the United States for the District of Oregon.

JOHN A. PARKER,

vs.

C. A. SMITH LUMBER and MANUFACTURING
COMPANY.

This cause was submitted to the Court upon the demurrer of the defendant to the complaint herein, upon written briefs filed by the respective parties; on consideration whereof, it is Ordered and adjudged that said demurrer be and the same is hereby overruled.

And afterwards, to wit, on the 9th day of March, 1914, there was duly filed in said Court, an Opinion on Demurrer, in words and figures as follows, to wit:

Opinion.

In the District Court of the United States for the District of Oregon.

JOHN A. PARKER,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY.

Memorandum on Demurrer to Complaint by BEAN,
District Judge:

This is an action to recover damages for breach of a contract of employment. It is alleged in the complaint that in December, 1908, while the plaintiff was employed by the defendant company, he received an injury which resulted in the loss of the right hand; that thereafter he and the company entered into an agreement of settlement, by the terms of which plaintiff signed a release in writing discharging the defendant from all liability on account of the accident for the consideration of \$200 and an oral agreement of defendant to give him employment so long as he wanted it at any work in defendant's mill which he was able to do; that in pursuance of such agreement the plaintiff entered the service of the defendant and continued to work for it, performing his work to its satisfaction, until January, 1913, when he was discharged, in violation of the agreement.

The defendant has demurred to the complaint on the ground principally that the release and settlement constitute a written contract, and cannot be varied by parole evidence showing an additional consideration from that stated therein.

Upon reading the complaint, my first impression was that the demurrer was well taken and that the receipt or acquittance should be treated as containing all the terms of the settlement, and consequently parole evidence was not admissible to

show an additional consideration from that stated therein. But I find the adjudged cases to be to the contrary. The holdings are that an acquittance not contractual in form is a mere receipt and is conclusive only as to the amount of money paid; that parole evidence is permissible to establish the parts of the contract, if any, not contained in the writing, unless the consideration as stated in the writing is contractual in its nature. It was so held in *Pennsylvania Company v. Dolan*, 32 N. E. 802, a case quite similar to the one at bar, and to the like effect in *Allen v. Tacoma Mill Company*, 51 Pacific 372, and the recent case in the State Supreme Court of *Holmboe v. Morgan*.

Demurrer overruled.

Filed March 9, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 20th day of March, 1914, there was duly filed in said court, an answer, in words and figures as follows, to wit:

ANSWER.

In the District Court of the United States for the District of Oregon.

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation,

Defendant.

Comes now the defendant above named and for

its answer to the complaint of the plaintiff in the above entitled action:—

I.

ADMITS the allegations contained in paragraph numbered 1 of said complaint, excepting that defendant DENIES that it is, or at the time the complaint herein was filed was operating more than one saw mill.

II.

ADMITS that the plaintiff was a mill wright, and had served an apprenticeship therein in the Dominion of Canada, and had worked as a mill wright at various places and for various periods of time prior to the time of the alleged injury in the complaint set forth.

III.

ADMITS that in the month of December, 1908, the plaintiff was in the employ of this defendant at its saw mill called the C. A. Smith mill, and ADMITS that by and with the consent of the plaintiff this defendant retained out of plaintiff's wages the sum of One Dollar per month and paid the same over to one George E. Dix, a physician and surgeon under a contract and agreement entered into and assented to by the plaintiff and by this defendant, and by the said George E. Dix whereby for said payment of One Dollar per month so retained out of plaintiff's wages, and paid to the said George E. Dix, by the defendant for the plaintiff, the said George E. Dix agreed to and was to furnish, and was furnishing the plaintiff with medical and surgical attend-

ance and hospital services during the period covered by said employment, but DENIES that the defendant as a part of the contract of employment, or otherwise, or at all agreed to provide the plaintiff with the services of a physician and surgeon or hospital care and attendance, and ALLEGES that said agreement was between the said George E. Dix and the plaintiff as above set forth, and not otherwise.

IV.

DENIES any knowledge or information sufficient to form a belief as to the injury or alleged injury to the plaintiff's left leg as set forth in paragraph numbered 4 of the complaint herein, and DENIES that said alleged injury was due to, or was contributed or claimed to be due to any negligence or carelessness of this defendant whatsoever, or that this defendant or its officers were so notified by the plaintiff or otherwise, and DENIES that the plaintiff was treated therefor in a careless or unskillful manner by the said Dr. Dix, or by or on behalf of the defendant or that as a result of any carelessness or unskillful treatment by the said George E. Dix, or by or on behalf of this defendant the plaintiff became infected with blood poison, and DENIES that plaintiff was required to have his right hand amputated as a result of such alleged negligence or negligent treatment, or at all.

V.

DENIES that the plaintiff claimed to have a cause of action against the defendant for damages

by reason of the matters contained and alleged in paragraph numbered 4 of said complaint.

VI.

ADMITS and ALLEGES that the plaintiff and defendant entered into an agreement in writing on the 25th day of September, 1909, which said agreement was in words and figures as follows, to-wit:

“For the sole consideration of the sum of Four hundred ten and 75-100 Dollars, this 25th day of September, 1909, received from C. A. Smith Lumber & Mfg. Co. I do hereby acknowledge full satisfaction and discharge of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 16th day of December, 1908, while in the employment of the above.

\$410 75-100 (Signed) J. A. PARKER [Seal]

Witness, ARNO MERREEN,

Address, Marshfield.

Witness, DAVID NELSON,

Address, Marshfield.

VII.

ALLEGES that said settlement so made as above set forth was the only settlement or agreement ever made between the plaintiff and defendant subsequent to the 6th day of February, 1909, and was the only release or settlement agreement ever executed by the plaintiff and the defendant, and was intended and understood by all the parties thereto to be and was a full and complete settlement of all the claim of the plaintiff against the defendant by

reason of any of the matters alleged in the complaint herein, and was intended to and did set forth the full consideration therefor.

VIII.

As a further and separate defence herein defendant ALLEGES that by reason of said written agreement and receipt the plaintiff is estopped to set up any other further promise, agreement, or consideration than the sum so set out and receipted therefor therein, and that the plaintiff is forbidden by the laws of the State of Oregon, and especially by Section 713 L. O. L. to vary the terms of said written agreement, and ADMITS that Mr. Arno Mereen, the general superintendent of defendant, voluntarily informed the plaintiff that as long as conditions were satisfactory and his work properly performed, he, on behalf of the defendant, would be glad to employ the plaintiff at such work as he could properly perform, but DENIES that said settlement or agreement was entered into upon consideration of any terms to that effect, or that as a part of, or an inducement to said settlement, any promise or agreement to that effect was made or entered into by or on behalf of the defendant, or that there was any promise or agreement or consideration whatsoever for said settlement other than that set forth and included in said writing above set forth.

IX.

ADMITS that the plaintiff, both before and after said settlement, was employed by the defendant, and filled numerous different positions, and that

he was employed for a time as trimmer in charge of a trimming machine in the mill of defendant: but DENIES that the plaintiff continued continuously in that position to the 31st day of January, 1913.

X.

As a further and separate defence thereto, the defendant ALLEGES that the plaintiff voluntarily, and of his own accord ceased to labor for or in the employment of the defendant, and without cause or reason cancelled his employment and contract of employment with the defendant and left the employ of the defendant on the 23rd day of September, 1911, and thereby terminated any and all agreements or claimed agreements of employmen theretofore existing or claimed to exist by and between the plaintiff and defendant.

XI.

DENIES that the going wages for trimmers are \$3.50 per day, and ALLEGES that for such employment in the County of Coos, State of Oregon, the said wages are and at all times in the complaint mentioned were from \$2.50 to \$3.00 per day according to the labor performed and the quantity of material handled, and that the regular or going wages for the work performed by the plaintiff upon the machine operated by the plaintiff and in the place occupied by him were at all times, have been, and now are \$3.00 per day, and the plaintiff while occupying said position was at all times paid the said wages of \$3.00 per day by the defendant.

XII.

ADMITS that the plaintiff at the time he quit

the employment of the defendant was, and at all times since has been, and now is capable of running a trimmer, and of earning the wages paid to a trimmer, and of acting as time keeper and of looking after the stores, and measuring lumber in the yards and was and still is capable of earning the wages paid to men for those several employments, and ADMITS and ALLEGES that the plaintiff was and is capable of following many other useful and gainful occupations and receiving compensation therefor, and of earning the sum of \$3.50 per day.

XIII.

ADMITS that the defendant was, and still is running a sawmill at or near the City of Marshfield, and giving employment to men to measure lumber, and act as time keeper, and trimmer, and to look after stores, but ALLEGES that the mill plant in which the plaintiff was employed was at the said time, and ever since has been, and now is shut down, and not in operation, and DENIES that the plaintiff was on the 31st day of January, 1913, or at any time, ready and willing to perform any of the services above mentioned, for the defendants, and ADMITS that the defendant has not employed the plaintiff since said date.

XIV.

Further answering, and as a further defence herein, the defendant ALLEGES that since the 31st day of January, 1913 the plaintiff has been employed at various gainful occupations and ever since said date has been employed in business, and earning

\$3.00 per day, and more, and DENIES that the plaintiff has been or is without employment, or unable to procure employment.

XV.

Further answering, the defendant DENIES each and every allegation in the complaint herein contained not hereinbefore admitted, qualified, or specifically denied.

JOHN D. GOSS,
JOHN C. KENDALL,
Attorneys for Defendant.

State of Oregon,
County of Coos,—ss.

I, David Nelson, being first duly sworn, on oath depose and say that I am Cashier of the defendant named in the within and foregoing answer, that I have read the same, know the contents thereof, and the same is true and correct as I verily believe.

DAVID NELSON.

Subscribed and sworn to before me this the 16th day of March, 1914.

[Seal]

EVELYN JOHNSON,
Notary Public for Oregon.

State of Oregon,
County of Coos,—ss.

I hereby acknowledge due and personal service of the foregoing Answer in the within entitled cause on me this 17th day of March, A. D. 1914, by receipt

personally in Coos County, Oregon, of a duly certified copy thereof.

STOLL,

Attorney for Plaintiff.

Filed March 20, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 23rd day of March, 1914, there was duly filed in said Court, a Reply, in words and figures as follows, to wit:

Reply.

Rec'd Mar. 20, 1914.

In the District Court of the United States, for the District of Oregon.

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation,

Defendant.

The plaintiff for reply to the answer of the defendant, says that:

1. He admits that he signed an instrument in writing, a copy of which is contained in paragraph six of said answer.

2. He denies each and every allegation contained

in said answer, not herein or in the complaint admitted of affirmatively alleged.

WM. T. STOLL,
307 Coke Building,
Marshfield, Oregon.
I. N. SMITH,
Corbett Building,
Portland, Oregon.
Attorneys for Plaintiff.

State of Oregon,
County of Coos,—ss.

I, Wm. T. Stoll, being duly sworn on my oath, depose and say: That I am one of the attorneys for the plaintiff in the above entitled action; I have read the foregoing Reply, know the contents thereof, and I believe the same to be true; I make this affidavit on the part of the plaintiff, because the plaintiff is now within Coos County, where I reside, nor is he within Multnomah County, within which this action is pending.

WM. T. STOLL.

Subscribed and sworn to before me this 19th day of March, 1914.

[Seal]

HARRY G. HOY,
Notary Public for Oregon.

State of Oregon,
County of Coos,—ss.

I hereby acknowledge due and personal service of the foregoing reply in the within entitled cause, on me this 19th day of March, 1914, by receipt per-

sonally in Coos County, Oregon, of a duly certified copy thereof.

JOHN D. GOSS,
of Attorneys for Defendant.
Filed March 23, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 18th day of June, 1914, there was duly filed in said Court, a Verdict in words and figures as follows, to wit:

Verdict.

In the District Court of the United States for the District of Oregon.

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER and MANUFACTURING
COMPANY, A Corporation,

We, the jury in the above Court and cause, duly empaneled and sworn for our verdict say:

We find for the plaintiff, John A. Parker, against the defendant C. A. Smith Lumber and Manufacturing Company, and fix the amount of his recovery at Twenty-Five Hundred (\$2500.00).

J. N. BELLINGER,
Foreman.

Filed June 18, 1914, A. M. Cannon, Clerk.

And afterwards, to wit, on Thursday, the 18th day of June, 1914, the same being the 94th Judicial day of the regular March, 1914, term of said Court; Present: the Honorable ROBERT S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

No. 6240
June 18, 1914.

Judgment.

In the District Court of the United States for the District of Oregon.

J. A. PARKER,

v

C. A. SMITH LUMBER and MANUFACTURING
COMPANY,

Now, at this day, come the parties hereto by their counsel as of yesterday, and the jury empaneled herein being present and answering to their names, the trial of this cause is resumed and said jury having heard the evidence adduced, the arguments of counsel and the charge of the Court, retire in charge of the proper sworn officers to consider of their verdict; and thereafter said jury return into court their verdict as follows, viz: "We, the jury in the above court and cause, duly empannelled and sworn for our verdict say, We find for the plaintiff John A. Parker,

against the defendant C. A. Smith Lumber and Manufacturing Company, and fix the amount of his recovery at Twenty Five Hundred (\$2500.00) J. N. Bellinger, Foreman" which said verdict is received by the Court and ordered to be filed; whereupon it is considered that said plaintiff do have and recover of and from said defendant the said sum of \$2500.00 together with his costs and disbursements herein, taxed at \$——— and that execution issue therefor. Whereupon on motion of said defendant, it is Ordered that said defendant be and is hereby allowed sixty days from this date within which to submit a bill of exceptions herein and that in the mean time execution be stayed; and it is further ordered that the time within which defendant is allowed to file a motion for new trial herein be, and the same is hereby extended twenty days.

And afterwards, to wit, on the 8th day of July, 1914, there was duly filed in said Court, a Motion For New Trial with Affidavits Attached Thereto, in words and figures as follows, to wit:

Motion For New Trial.

In the District Court of the United States for the District of Oregon.

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation,

Defendant.

Comes now the above named defendant, by John D. Goss, its attorney, and upon the annexed affidavits, and upon the minutes, records and papers in the said trial, moves the court for and order herein setting aside the verdict and judgment heretofore rendered and entered herein, and granting to defendant a new trial of the above entitled cause, upon such terms and conditions as to the court may seem just; on the following grounds:

1st. That the defendant was prevented from having a fair trial by the failure of its witnesses to appear, and the refusal of the court to grant further time therefor.

2nd. By accident and surprise as follows, (a) that defendant and defendant's attorney were surprised by the refusal of the plaintiff and the plaintiff's attorney to allow the postponement of said trial until after the trial of the succeeding case, as had theretofore been agreed upon, (b) by the breaking down of the automobile upon which the witnesses Dresser, Mathison, and Rouke were coming to said trial, which prevented their arriving in time therefor as they otherwise would have done.

3rd. On account of newly discovered evidence, as Motion set forth in the affidavits hereto annexed and hereby made a part hereof.

4th. Insufficiency of the evidence to support or justify a verdict for the defendant, as follows. (a) in that there was no evidence showing how much the plaintiff was making or had been making or earn-

ing, since the breach of contract sued upon, (b) in that there was no evidence offered or submitted tending to show that the plaintiff had sought employment elsewhere or at all since the alleged breach of contract.

And further moves the Court that an order staying execution of judgment herein pending the decision of the foregoing motion for a new trial.

Respectfully submitted.

JOHN D. GOSS,
Attorney for Plaintiff.

AFFIDAVIT OF JOHN D. GOSS.

State of Oregon,
County of Coos,—ss.

I, John D. Goss, being first duly sworn on oath depose and say that I am, and at all times since the commencement thereof have been the attorney for the defendant C. A. Smith Lumber and Manufacturing Company in the foregoing entitled action;

That as such attorney I talked with W. T. Stoll, the attorney for the plaintiff therein, and was informed by him some weeks previous to the trial thereof that inasmuch as he and myself were interested as attorneys for the parties in several of the cases to be tried immediately succeeding this cause and in the same court, that he was willing and the plaintiff would be willing that the said cases be taken up in whatever order would best suit the convenience of the defendant;

That I communicated this arrangement to the de-

fendant C. A. Smith Lumber and Manufacturing Company, and relied thereon in arranging for said trial;

That I left Marshfield, Coos County, Oregon, on Thursday, the 4th day of June, and was busy thereafter in the supreme court of the state at Salem, in the above entitled court, and in the circuit court of Multnomah County, State of Oregon, until the trial of this cause, and did not return to Marshfield, Oregon, until the 26th day of June;

That I notified the witnesses in the several cases to be tried in the above entitled court to be present in Portland on the 17th of June; that I was occupied in the trial of a cause in the supreme court of the state of Oregon until late in the afternoon of the 16th day of June; that on returning to Portland, I discovered that all the witnesses required in the above entitled cause had not appeared, and that early on the morning of June 17th, I called up attorneys for the plaintiff and requested that the trial of the above entitled cause be postponed until after the trial of the next succeeding cause, i. e., the case of Marttila vs the Coos Bay Pulp & Paper Company, in which they appear as attorneys for the plaintiff, and I appeared as attorney for the defendant, but they then informed me that they would not consent to a change at that time; that I immediately, or as soon thereafter as possible, got into communication with the defendant company in the above entitled cause, and had the remaining witnesses, of whom I had any knowledge

at that time, to-wit: F. H. Dresser, Bernt Mathison, and George Rourke, at once start in an automobile for the railroad, at Roseburg; that their delay in coming was occasioned by the understanding of the defendant that this trial should be postponed to the trial of the other cause, and to the fact that I was not present in Marshfield at the time, to the further fact that communication with Marshfield is very difficult, uncertain, and hard to understand, and that telegraphic communication is somewhat slow and uncertain;

That I stated to the court that these witnesses were coming and should be there on the morning of the 18th, but was apprised by telegram on the morning of the 18th that their automobile had broken down, and that they had failed to reach the train, and would not reach Portland until 4:35 that afternoon.

That I did not know the plaintiff would deny the statements which these witnesses claimed he had made to them, and that I stated to the court that said witnesses had been this delayed, and asked that the case be held open pending their arrival; that the defendant and myself in conducting defendant's case, acted in entire good faith, and did not in any way endeavor to delay or prolong the same, as might legally have been done, but proceeded with that trial in an expeditious manner.

That I made careful inquiry of the various employees of the mill of defendant in general, and of the timekeeper, and of the mill foreman of the mill at which the plaintiff worked in an endeavor to pro-

cure all the witnesses who had knowledge of any facts bearing upon the case, or who would be proper witnesses for the defendant therein; but was unable to find any witnesses other than those present at the trial, and the persons who were delayed by the accident to the automobile and thus prevented from appearing at said trial, as appears from the several affidavits filed herewith; that the witnesses Johnson, Harrington, Molony, Dennison, Moore, Richardson, and Hardin were not known to me until after the trial of the above entitled cause, nor was I able to learn that they knew anything about the said cause, or would be witnesses at the same, and that they were only discovered since said trial by reason of the fact that they thought the same over, and that they could safely speak without being involved as witnesses therein.

That this affidavit is made for the purpose of the annexed motion for a new trial.

JOHN D. GOSS,

Subscribed and sworn to before me this the 6th day of July, 1914.

[Seal]

EVELYN JOHNSON,
Notary Public for Oregon.

AFFIDAVIT OF A. L. BUTZ.

State of Oregon,
County of Coos,—ss.

I, A. L. Butz, being first duly sworn on oath depose and say that I am, and at all times since the commencement of the foregoing entitled action have

been the timekeeper of the C. A. Smith Lumber and Manufacturing Company, and as such came more in contact with all of the men employed by said company than any other employe thereof; that after the commencement of the foregoing entitled action, I was instructed by said company and by its attorney, Mr. John D. Goss, to look up the witnesses and evidence in respect thereto; and accordingly endeavored to find out from the men then employed by the company and from those who had been therefore employed, and from others the names of anyone who would know of the facts involved in said action and just what facts were known by said persons:

That I enquired generally of the employes of the East Side Mill at which Parker had worked, if they knew anything about his contract or claimed contract with the company, or about his working for or quitting work for the company, and addressed this inquiry to a great many of the men employed around the plant, and especially to those known to me to have been working there at the time Parker was employed there, to-wit, to the trimmermen, the tallymen, the graders, and slasher men, which employes worked near the point where said John A. Parker worked in said mill, but on account of the long lapse of time since said Parker was injured and since he quit the employment of said company, none of said men professed to know or remember anything about the same excepting Felix Kester, George Rourke, who were employed in said East Side Mill; that I

enquired of numerous of the other employes of the company in the West Side or main mill, and of all the foremen and bosses in both of said places, and the only persons who further professed any knowledge of said cause were F. H. Dresser and Bernt Mathison; that said Felix Kester was present at said trial, and said Rourke, Dresser and Mathison were prevented from attending by reason of the breaking down of the automobile conveying them to the railroad from the said City of Marshfield, as more fully appears from their affidavits submitted herewith; that since said trial and the judgment rendered therein has become known among the workmen employed in said plant, and in and about Marshfield generally, there has been considerable discussion thereof, men's memory have been refreshed thereby, and men who had otherwise refrained from stating or admitting that they had any knowledge thereof, have spoken about the facts as disclosed in several affidavits hereto annexed, as all of the men thought that the case was over, and they could not now be called as witnesses; that I was not able, and could not discover, prior to the trial of the cause, the several witnesses or the evidence of the several witnesses since discovered and set forth in the affidavits of the said several witnesses herewith submitted other than the evidence of said Dresser, Mathison, and Rourke, and that that portion of the evidence of said Mathison relative to statements made by Parker at the school meeting was not remembered or mentioned by said Mathison, nor discovered by me, prior to said trial.

That I make this affidavit for the purpose of the

annexed motion for a new trial and that I could not have discovered the new evidence since said trial by any amount of diligence before said trial.

A. L. BUTZ.

Subscribed and sworn to before me this 6th day of July, 1914.

EVELYN JOHNSON,
Notary Public for Oregon.

[Seal]

AFFIDAVIT OF R. P. HARRINGTON.

State of Oregon,
County of Coos,—ss.

I, R. P. Harrington, being first duly sworn, on oath depose and say that I am and at all times in this affidavit mentioned was acquainted with John A. Parker;

That during the month of September, 1911, I was employed as sweeper in the basement of the plant known as the East Side Mill of the C. A. Smith Lumber and Manufacturing Company, and that while crossing the bay in a boat, one evening, John A. Parker told me he had quit his job as trimmerman, in said mill, that he had struck for more wages, and afterwards he told me that he had gone back to work again; and although he discussed the same with me both before and after the said time, that he quit, he never at any time mentioned that he had any con-

tract or agreement with the company whereby it had agreed to give him such employment.

R. P. HARRINGTON.

Subscribed and sworn to before me this 6th day of July, 1914.

[Seal]

EVELYN JOHNSON,

Notary Public for Oregon.

AFFIDAVIT OF L. S. O'CONNOR.

State of Oregon,

County of Coos,—ss.

I, L. S. O'Connor, being first duly sworn, on oath, depose and say that I am a resident of Coos County, Oregon, residing at North Bend, in said County, and am not an employe of the C. A. Smith Lumber & Manufacturing Company, but that during the month of September, 1911, I was acquainted with the plaintiff John A. Parker in the foregoing entitled action, and at that time said Parker was working as a trimmerman in the plant known as the East Side Mill, of the C. A. Smith Lumber & Manufacturing Company, and during the month told me that he had struck for more pay, and would quit unless they gave it to him; but never at any time mentioned to me that he had any contract or agreement with the C. A. Smith Lumber & Manufacturing Company whereby it was bound to employ him.

L. S. O'CONNOR.

Subscribed and sworn to before me this the 6th day of July, 1914.

EVELYN JOHNSON,

Notary Public for Oregon.

[Seal]

AFFIDAVIT OF WILLIAM C. HAYDEN.

State of Oregon,
County of Coos,—ss.

I, William C. Hyden, being first duly sworn, on oath depose and say that I am a resident of Marshfield, Coos County, Oregon, and in the year 1911 I was sawyer on the band gang saw in what is known as the West Side or big mill of the C. A. Smith Lumber & Manufacturing Company, and that at some time during the year, but the exact date or month I do not remember, Mr. John A. Parker, the plaintiff in the foregoing entitled action, and who was known to me, came into the place where I was working, and I asked him what the trouble was, that he was not working, in response to which he told me that he had quit on the other side,—meaning thereby the East Side, or small mill,—but that he had struck them for a raise and they would not give it to him; that he did not have to work for them, that he could make a living any way, and the said John A. Parker never at any time made any statement or claim to me that he had any contract or agreement with the Company whereby they were bound to employ him.

WILLIAM C. HYDEN.

Subscribed and sworn to before me this the 6th day of July, 1914.

EVELYN JOHNSON,
Notary Public for Oregon.

[Seal]

AFFIDAVIT OF ALFRED JOHNSON

State of Oregon,
County of Coos,—ss.

I, Alfred Johnson, being first duly sworn on oath, depose and say that I am, and at all the times in this affidavit mentioned, have been a resident of Bunker Hill, Coos County, Oregon, and the janitor of the Bunker Hill school house, in said County, and that at all said times I have been acquainted with John A. Parker, the plaintiff in the foregoing entitled action; that I was present at said school house, at a school meeting held thereat in the month of September, 1911, and upon the steps of said school house said John A. Parker, in my presence and hearing, stated that he had quit working for the C. A. Smith Lumber and Manufacturing Company; that he wanted four bits a day more than they would pay him and he quit;

That said John A. Parker also stated to me after he had finally quit working for said Company that he was sorry he had not quit before, as he was making more money than he did before.

ALFRED JOHNSON.

Subscribed and sworn to before me this the 6th day of July, 1914.

EVELYN JOHNSON,
Notary Public for Oregon.

[Seal]

AFFIDAVIT OF CHARLES DENNISON.

State of Oregon,
County of Coos,—ss.

I, Charles Dennison, being first duly sworn on oath depose and say that I am a resident of Coos County, Oregon, and at all times in this affidavit mentioned I was acquainted with John A. Parker, the plaintiff mentioned in the foregoing entitled action.

That during the month of September, 1911, I was employed as engineer at the plant known as the East Side Mill of the C. A. Smith Lumber & Manufacturing Company at which said plant said Parker was then employed as a trimmerman;

That some time during the said month, said Parker came to me and told me that he was going to "strike for more wages," that he had a cinch on the job and wanted \$3.50 per day, that he had it fixed so that they would have to give it to him; that soon thereafter he told me that he had quit his job; that he then was quite bitter in his statements against Felix Kester as said Kester had taken his job, and prevented him from getting his raise.

CHARLES DENNISON.

Subscribed and sworn to before me this the 6th day of July, 1914.

EVELYN JOHNSON
Notary Public for Oregon.

[Seal]

AFFIDAVIT OF J. P. MOLONY.

State of Oregon,
County of Coos,—ss.

I, J. P. Molony, being first duly sworn, on oath, depose and say that I am a resident of Coos County, Oregon, and at all times in this affidavit mentioned I was, and now am acquainted with John A. Parker, the plaintiff in the foregoing entitled action;

That during the month of September, 1911, I was employed as grader of lumber in what is known as the East Side Mill, of the defendant C. A. Smith Lumber and Manufacturing Company situated near Marshfield, Coos County, Oregon, which position as grader required me to grade the lumber as it came from the trimmer; that said John A. Parker was at said time also employed as trimmerman in said mill; that at one time during the said month, said John A. Parker came to me, and told me that he was going to quit in order to get better wages; that the next Monday thereafter said Parker was not at work in said mill; that thereafter the said Parker came and requested me to object to the manner in which the man who took his place was doing his work so that, as Parker explained, the company would be compelled to hire him, i.e., the said Parker, back again

to hold said position at the raised wages that he was demanding.

J. P. MOLONY.

Subscribed and sworn to before me this the 6th day of July, 1914.

EVELYN JOHNSON,
Notary Public for Oregon.

[Seal]

AFFIDAVIT OF FRED MOORE.

State of Oregon,
County of Coos,—ss.

I, Fred Moore, being first duly sworn on oath depose and say that I am a citizen resident of Coos County, Oregon, and am acquainted with John A. Parker, and was acquainted with him during the year of 1911.

That during the entire month of September, 1911, I was working under a contract with C. A. Smith Lumber and Manufacturing Company, for the cutting of shingles at their mill known as the East Side Mill near the City of Marshfield, Coos County, Oregon;

That sometime during the said month, approximately the middle of said month, the said John A. Parker, informed me that he was going to quit work for the company, that unless they paid him \$3.50 per day

for the work he was doing on the trimmer, he would quit working for them;

That said John A. Parker, subsequently, and a few days thereafter informed me that he had quit working for them, and expressed himself as being angry at the man who took his place, as he said that otherwise he would have secured the raise he was seeking,

FRED MOORE.

Subscribed and sworn to before me this the 6th day of July, 1914.

EVELYN JOHNSON,
Notary Public for Oregon.

[Seal]

AFFIDAVIT OF WALTER M. RICHARDSON.

State of Oregon,
County of Coos,—ss.

I, Walter M. Richardson, being first duly sworn, on oath depose and say that I am a resident of Bunker Hill, Coos County, State of Oregon, and am at all times in this affidavit mentioned was a police officer of the City of Marshfield, Coos County, Oregon;

That I am, and at all times herein mentioned was acquainted with John A. Parker the plaintiff in the foregoing entitled action, and that some time in the month of September, 1911, I was present at a school

meeting of the Bunker Hill School District, Coos County, Oregon, being at that time a director of said school district, and that said John A. Parker, was also present at said meeting;

That immediately after said meeting, and while standing on the steps of the school house, I asked said John A. Parker how things were running at the mill, in response to which he said in effect that he did not know anything about it; I then asked him what the matter was, and he said that they would not pay him within fifty cents of what he wanted, and he quit.

WALTER M. RICHARDSON,

Subscribed and sworn to before me this the 6th day of July, 1914.

EVELYN JOHNSON,
Notary Public for Oregon.

[Seal]

AFFIDAVIT OF BERNT MATHISON.

State of Oregon,
County of Coos,—ss.

I, Bernt Mathison, being first duly sworn, on oath depose and say that I am a resident of Coos County, Oregon, and during all the times in this affidavit mentioned was, and now am, the yard foreman for the C. A. Smith Lumber & Manufacturing Company, at its plant in the City of Marshfield, Oregon;

That during all said times I was and am now acquainted with John A. Parker, the plaintiff in the

foregoing entitled action; that some time in the fall of 1911, which by reference to date of a certain school election I am satisfied was in the month of September of said year, the said Parker came to me, and informen me that he had quit working for the company and that he wanted me to get his position back, and wanted me to intersede with George Rourke, the foreman of the East Side Mill, who lived neighbor to me, to help him to get his job back; I informed him that George was a fair minded man, and he would do just as well by going to him, himself;

I was also present at a school meeting of the Bunker Hill School District at about this time, at which Parker was present, and at which I heard him state to some one or to several people that he had quit his job at the East Side Mill;

That after he had quit, said Parker told me, in talking of it, that if the Company did not hire him back he would make it hot for them as they had been running cars that were not equipped in accordance with the requirements of the statute, and he would see that they suffered for it;

But said Parker never at any time claimed or mentioned to me that he had a contract or agreement with the Company whereby they had agreed to give him employment;

That in company with George Rourke and F. H. Dresser, and a chauffer, we left Marshfield, Oregon, at one o'clock June 17th by automobile, for Roseburg, in order to catch a train for Portland, so that

I might be present and testify in the foregoing entitled action on behalf of the defendant on the morning of the 18th;

That under ordinary conditions we would have readily reached Roseburg in ample time to have taken the evening train for Portland, but that we became stalled in what is known as the Canyon on said road, and it required eight hours for us to traverse four miles of said road, and although we worked hard and continuously, we did not reach Roseburg until about four o'clock on the morning of the 18th;

That we immediately started by automobile for Portland, but the machine became incapacitated, and we were compelled to take a train at Drain, and reached Portland at 4:35 in the afternoon of said day, and after said case had been closed.

BERNT MATHISON.

Subscribed and sworn to before me this the 6th day of July, 1914.

EVELYN JOHNSON,
Notary Public for Oregon.

[Seal]

AFFIDAVIT OF GEORGE ROURKE.

State of Oregon,
County of Coos,—ss.

I, George Rourke, being first duly sworn on oath, depose and say that I am a resident of Coos County, Oregon, that at all times in this affidavit mentioned

I was a foreman of the plant known as the East Side Mill, of the C. A. Smith Lumber & Manufacturing Company;

That during the month of September, 1911, John A. Parker, the plaintiff in the foregoing entitled action was employed as trimmerman in said mill, and came to me and demanded that his wages be increased;

He further said he would quit his job unless he received this advance, and I then told him I did not think he could get it;

That he informed me that he would quit the following Saturday night unless his pay was advanced, and on Saturday night he did so quit;

That I placed a man in his place, and turned in Parker's time to the time keeper as having quit;

That on the second Sunday after he so quit, i. e., eight days after the Saturday on which he stopped work, said Parker came to me and asked me to take him back to work at the same old wages, and I consented to take him back;

That said Parker never at any time claimed or intimated that he had any agreement or contract with the company whereby he was to be given steady employment by them;

That in company with George Rourke and F. H. Dresser, and a chauffer we left Marshfield, Oregon, at one o'clock, June 17th, by automobile, for Roseburg, in order to catch a train for Portland, so that I might be present and testify in the foregoing entitled action on behalf of the defendant on the morning of the 18th;

That under ordinary conditions we would have readily reached Roseburg in ample time to have taken the evening train for Portland, but that we became stalled in what is known as the Canyon on said road, and it required eight hours for us to traverse four miles of said road, and although we worked hard and continuously we did not reach Roseburg until four o'clock on the morning of the 18th; That we immediately started by automobile for Portland, but the machine became incapacitated, and we were compelled to take a train at Drain and reached Portland at 4:35 in the afternoon of said day, and after said case had been closed.

GEO. ROURKE.

Subscribed and sworn to before me this the 6th day of July, 1914.

HERBERT S. MURPHY.

Notary Public for Oregon.

[Seal]

AFFIDAVIT OF F. H. DRESSER.

State of Oregon,
County of Coos,—ss.

I, F. H. Dresser, being first duly sworn on oath depose and say that I am a resident of Coos County, Oregon, and am now, and at all times in this affidavit mentioned have been foreman at the West Side or large mill of the C. A. Smith Lumber & Manufacturing Company, situated in Marshfield, Oregon; that at all times in this affidavit mentioned I have

been acquainted with John A. Parker, the plaintiff in the foregoing entitled action;

That some time in the fall of 1911, the exact date I am unable to remember, but from other circumstances, believe it to have been in the month of September, 1911, the said John A. Parker, came to me and asked me to give him a job in the mill of which I was foreman, and he then and there stated to me that he had "bunched it on the other side", meaning that he had quit at the aforesaid mill of said company, saying that they would not pay him what he thought the job was worth, and he had quit;

That on the 17th day of June, 1914, together with Bernt Mathison and George Rourke, we started from the City of Marshfield, with an automobile and a chauffeur, at one o'clock P. M. in ample time to have reached Roseburg, and to have caught the 11:15 P. M. train for the City of Portland, which would have brought us to the City of Portland, early in the morning of the 18th of June; that said automobile was stalled in what is known as the Canyon on said road to Roseburg; that we procured horses and hurried as rapidly as possible, and traveled continuously all of said night, and did not reach Roseburg until 4:30 the next morning; that we then immediately started for Portland by automobile, but that the same broke down, and we were compelled to stop at Drain, and go from there to Portland by train, reaching there in the afternoon at 4:35 of said day.

F. H. DRESSER.

Subscribed and sworn to before me this the 6th day of July, 1914.

HERBERT S. MURPHY

Notary Public for Oregon.

[Seal]

State of Oregon,
County of Coos,—ss.

I, Herbert S. Murphy, being first duly sworn, on oath depose and say that I am a white male citizen of the United States, and of the state of Oregon and am over 21 years of age, and that I served the within and foregoing motion and affidavits upon William T. Stoll, one of the plaintiff's attorneys on the 6th day of July, 1914, at Marshfield, Coos County, Oregon, by then and there handing to and leaving with said William T. Stoll, personally and in person, a true copy thereof, and of the whole thereof, certified to be such by John D. Goss, the attorney for the defendant therein.

HERBERT S. MURPHY.

Subscribed and sworn to before me this 6th day of July, A. D. 1914.

JOHN D. GOSS,

Notary Public for Oregon.

Copy received July 6th, 1914, 6 o'clock and two minutes.

WM. T. STOLL,

Atty. for Pltff.

Filed July 8, 1914. A. M. Cannon, Clerk.

And to wit, on the 16th day of July, 1914, there was duly filed in said Court an Affidavit of Wm. T. Stoll, in words and figures as follows, to wit:

Affidavit of Wm. T. Stoll.

In the United States District Court for the District of Oregon.

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER and MANUFACTURING
COMPANY, A Corporation,

Defendant.

State of Oregon,
County of Coos,—ss.

I, Wm. T. Stoll, being duly sworn on my oath say; I am one of the plaintiff's attorneys in this case and have had the management of this cause at all times; I have read the affidavit, i. e., a copy of the affidavit, of John D. Goss, Esquire, sworn to and subscribed the 6th day of July, 1914, before Evelyn Johnson, Notary Public, and served upon me at Marshfield, July 6th, at two minutes after six o'clock, P. M.

In paragraph two of that affidavit he states:

"I was informed by him some weeks previous to the trial thereof that inasmuch as he and myself

were interested as attorneys for the parties in several of the cases to be tried immediately succeeding this cause and in the same court, that he was willing and the plaintiff would be willing that the said cases be taken up in whatever order would best suit the convenience of the defendant."

That statement is untrue. The facts with reference thereto are:—Mr. Goss met me on the streets of Mardhfield and stated to me that he had notice of setting of this case for the seventeenth of June, the Martilla case for the eighteenth of June and the Aho case for the nineteenth of June and that he had a case set in the Supreme Court at Salem for the seventeenth of June and he didn't see how he was going to be able to be in both places at the same time. In reply to that I stated that for **his accomodation** I would be willing to let the Martilla case change places on the calender with the Parker case (this case). He said in reply that he was attorney also in the Martjlla case and in the Aho case and that he would not allow any of those cases to proceed to trial without his presence so that he didn't see that that would help him any, and with that the subject was dropped. Not a word was said by me to the effect that I was willing or the plaintiff was willing that the causes mentioned might be taken up in whatever order would best suit the convenience of the defendant. Nothing was said and no thought entertained by me toward accomodating the defendant. I was disposed to accomodate Mr. Goss but was unable to do so as he declined my overtures in that direction.

I do not know the date of that conversation but it was some time prior to the trial.

I did not see Mr. Goss again until the afternoon of the 16th of June when I met him on the streets of Portland. Not a word was said by either of us at that time with reference to the cases. In the conversation, I told him I was stopping at the Multnomah Hotel. I spent the evening, the night and the morning until nine o'clock, at the hotel, either in the lobby or in my room. Mr. Goss did not call me up either at the hotel or elsewhere on the morning of the 17th of June or at any other time and request that the trial of this cause be postponed until after the trial of the Martilla case as stated in his affidavit. He never mentioned such a matter to me at any time or place in Portland.

I met Mr. Goss on the morning of the seventeenth in the Court Room about nine-thirty (the day on which this case was called for trial) but still he did not even mention the subject of postponing the trial of this cause till after the trial of the Martilla case, nor did he say one word to me then or ever about the absence of witnesses. Whether he made such a request of my associate, Mr. Smith, or not, I do not know. I understand from Mr. Smith, my associate, and Mr. Goss that the acquaintance between them is slight and of comparatively short duration, while the acquaintance between myself and Mr. Goss has extended over two years and has been, as far as I know, friendly if not intimate, and there is no reason why he should not have made the request of me

had he so desired to change the order of trial of this case with the Martilla case, particularly so as he claims to have had an understanding with me, and particularly so as he knew that I had the management of this case, and further I say not.

WM. T. STOLL,

Subscribed and sworn to before me this 7th day of July, 1914.

W. U. DOUGLAS,

[Seal]

Notary Public for Oregon.

Copy of the within affidavit received this July 7th, 1914, at Marshfield, Oregon.

JOHN D. GOSS,

Attorney for Defendant.

Filed July 16, 1914. A. M. Cannon, Clerk.

And afterwards, to-wit, on the 13th day of July, 1914 there was duly filed in said Court, an Affidavit of John D. Goss, in words and figures as follows, to wit:

Affidavit of John D. Goss.

In the United States District Court for the District of Oregon.

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation.

State of Oregon,
County of Coos,—ss.

I, John D. Goss, being first duly sworn, on oath, depose and say that I have read the affidavit of William T. Stoll, made on the 7th day of July, 1914, and in reply thereto depose and say that on the 23rd day of April, 1914, I received through the United States mails a letter from Isham N. Smith, the attorney associated with William T. Stoll as attorneys for the plaintiff, a copy of which is hereto attached, marked [Exhibit A] and hereby made a part hereof;

That soon thereafter I discussed the matter with Mr. Stoll, and informed him that it might serve my convenience to change the order of trial of the said last three cases mentioned in said letter in all of which he appeared as attorney for the plaintiff, and I appeared as one of the attorneys for the defendant, and he stated that it would be perfectly satisfactory to the plaintiffs to take up the trial of said causes in any order that suited my convenience, and I then told him that I would look the matter up and determine what was best to be done; that some several days before the trial of the above entitled cause, I called upon Mr. Isham N. Smith, at his office in Portland, and he then informed me that so far as he was concerned any arrangements of the cases would be satisfactory that I thereupon wired Mr. Arno Mereen, the Superintendent of the C. A. Smith Lumber & Manufacturing Company, and one of the main witnesses for the said defendant in the trial of the Parker case, that the case could be tried on any of the dates

from the 17th to the 19th, that it probably would not be safe to rely upon waiting until later than the 20th;

That I did not see Mr. Stoll on the 16th of June in the city of Portland, or elsewhere, and had no conversation with him whatever; that I left the City of Portland for the city of Salem early in the morning of the 15th of June, and remained in the City of Salem until the evening of the 16th of June, arriving in Portland at approximately 8:45 P.M. of said date that I spent the evening in looking up the witnesses for the parties represented by me in said several cases, and that on the morning of the 17th I called up the office of Mr. Isham N. Smith on the telephone and requested that the Marttila case be tried before the Parker case, as there was danger of my witnesses not arriving; that a person purporting to be Mr. Isham N. Smith answered me on the telephone, and said Mr. Stoll was there, and after a brief consultation with some one, he replied to me that they could not postpone the case on account of the absence of one of their witnesses, or something to that effect, and that they would require that the Parker case proceed to trial that day;

That I thereupon immediately telegraphed and telephoned to Marshfield to procure the attendance of the witnesses who had not started, with the result set forth in my former affidavit herein.

JOHN D. GOSS.

Subscribed and sworn to before me this the 10th day of July, 1914.

[Seal]

HERBERT S. MURPHY,
Notary Public for Oregon.

[Exhibit A.]

To Affivavit of John D. Goss.

April 21, 1914.

Hon. John D. Goss,
Marshfield, Ore.

Dear sir:

In the several cases which you have against Mr. Stoll, together with some other cases which I have, the Court on yesterday set them in the following order for the following dates:

1. Stipel vs Gustafson, June 11, 1914
2. Conley vs S. P. Co., June 12, 1914
3. O'Hara vs Lewis A. Hicks Co., follows Conley case
4. Parker vs C. A. Smith Lbr. Co. June 17, 1914.
5. Marttila vs Coos Bay Pulp & Paper Co., June 18, 1914

You will observe that the three first names (sic) cases which I have are ones in which neither you or Mr. Stoll have any interest. I have given you the dates of them, however, so that you and Mr. Stoll may confer concerning the several cases which you respectively have against each other and so you may arrange the cases in any of the dates above

specified to suit the convenience of yourselves.

I wrote Mr. Stoll concerning these dates on yesterday and I would ask you to take the matter of the order of the trials as well as the respective dates, up with Mr. Stoll.

With best wishes, I am,

Yours truly,

(Signed) ISHAM N. SMITH.

H.

Recd. a copy July 10th, 1914.

W. T. STOLL.

Filed July 13, 1914. A. M. Cannon, Cl rk.

And afterwards, to wit, on the 16th day of July, 1914, there was duly filed in said Court, an Affidavit of William T. Stoll, in words and figures as follows, to wit:

Affidavit of William T. Stoll.

In the United States District Court for the District of Oregon.

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER and MANUFACTURING
COMPANY, A Corporation,

Defendant.

State of Oregon,
County of Coos,

I, Wm. T. Stoll, being duly sworn upon my oath say, I have read the affidavit of John D. Goss, sworn to the 10th of July and entitled,

“Affidavit of John D. Goss, Replying to Affidavit of Wm. T. Stoll.” copy of which was served on me yesterday (Tenth of July).

In his affidavit, among other things he states,

“He (affiant) stated that it would be perfectly satisfactory to the plaintiff to take up the trial of said causes in any order that would suit my convenience.”

I deny that I made that statement to Mr. Goss or that I made any other statement to him on the subject mentioned except as contained in my former affidavit filed herein.

I note also that he now says that he had a conversation on the 'phone with Mr. Smith, my associate, or someone representing himself as Mr. Smith, in which he requested of him that this case change places with the Martilla case, on the calender, and that in the conversation Mr. Smith turned to someone in his office whom he understood to be the affiant and inquired of him (me) if that would be satisfactory, or that in substance. I have no knowledge of that. I was not in Mr. Smith's office the morning referred to. Mr. Smith did not turn to me from the 'phone and make such an inquiry; I did not know that he had a conversation with Mr. Goss on the subject, and further I say not.

Wm. T. STOLL.

Subscribed and sworn to before me this 11th day of July, 1914.

ARTHUR K. PECK,
[Seal] Notary Public for Oregon.

Service admitted of a true copy of the within Affidavit of Wm. T. Stoll, this 11th day of July, 1914.

JOHN C. KENDALL,
one of Attorneys for Defendant.
Filed July 16, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 20th day of July, 1914, there was duly filed in said Court, a Supplemental Affidavit of A. L. Butz, in words and figures as follows, to wit:

Supplemental Affidavit of A. L. Butz.

*In the District Court of the United States in and for
The District of Oregon.*

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation,

Defendant.

State of Oregon,
County of Coos,—ss.

I, A. L. Butz, being first duly sworn, on oath depose and say that since the making of the affidavit by

me on the 6th of July, in the above entitled case I have thought over the matter, and refreshed my memory concerning my actions in the endeavors made by me to learn of witnesses and procure evidence on behalf of the defendant in said case; that before the trial of said case, I inquired of numerous men whose names I can not remember as to whether or not they knew anything concerning the case; and particularly of Fred Sandberg, trimmerman in the mill, Ray Chapin, assistant sawyer in said mill, an acquaintance of the plaintiff, and who lived in plaintiff's house, J. D. McDougal, a carpenter who worked in the Eastside Mill, and lived next door to plaintiff, Frank Eckley machinist who worked in and around said Eastside Mill, of Charley Olson, the saw filer who looked after the saws upon the trimmer upon which said Parker worked, and of August Isaacson, the head filer in the mill, who directed the work in connection with the saws upon the trimmer, without learning of any of the witnesses discovered since the trial, or that they knew anything about the case; that of the new witnesses since discovered, only two are in the employ of the company, to-wit: Charles Dennison, and William Hyden; that I enquired of said Dennison in a general way, but not knowing that he knew anything about the case, and he stating at that time that he knew nothing about the case, I did not discover that he knew or could testify to the facts set forth in his affidavit.

That I enquired of the foreman of said Eastside Mill, Mr. George Rourke, as to who would be apt

to know anything about the case, and he referred me to John Olson and John Cottor, but neither of them knew anything concerning the same; and he also referred me to John Coates, but I was unable to find said Coates, or to learn his address, and have just recently learned that he is in Hoquiam, Washington, but have been unable to get in touch with him

A. L. BUTZ.

Subscribed and sworn to before me this the 17th day of July, 1914.

[Seal]

EVELYN JOHNSON,
Notary Public for Oregon.

State of Oregon,
County of Coos,—ss.

I, John C. Kendall, one of the attorneys for the defendant in the foregoing entitled action hereby certify that I served the foregoing affidavit upon Wm. T. Stoll, one of the attorneys for the defendant therein on the 17th day of July, A. D. 1914, at Marshfield, Coos County, Oregon, by then and there handing to and leaving with the said W. T. Stoll, a copy thereof, duly certified by me to be a correct copy thereof.

JOHN C. KENDALL,
One of Attorney for Defendant.

Filed July 20, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 27th day of July, 1914, there was duly filed in said Court, an Affidavit of Isham N. Smith, in words and figures as follows, to wit:

Affidavit of Isham N. Smith.

In the District Court of the United States for the District of Oregon.

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation,

Defendant,

State of Oregon,

County of Multnomah,—ss.

I, Isham N. Smith, being first duly sworn, say:

That I have read the affidavit of John D. Goss in support of his application for a new trial in the above cause.

That in this case, as well as in several other cases wherein I have been associated with William T. Stoll, I have on every occasion wherein the question arose, notified and told Mr. Goss, the attorney for the defendant that the management of these cases was and is in Mr. Stoll; that whatever arrangement he could make with Mr. Stoll as to the trial was agreeable to me.

Heretofore, at the request of Mr. Stoll, and on April 20th, 1914, I appeared in the above court

and cause, among other causes, and procured the same to be set. The minutes of such action relating to this case are in Law Journal 23, page 362, as follows:

"43rd day, March Term, Monday, April 20, 1914.

"B.j.

"John A. Parker vs. C.A. Smith Lumber & Manufacturing Company. No. 6240. April 20th, 1914.

"Now at this day come the plaintiff, by Mr. Isham N. Smith, of counsel, whereupon on motion of said plaintiff it is ordered that this case be and the same hereby is set for trial on Wednesday, June 17th, 1914."

Thereupon I wrote and mailed by regular United States mail to William T. Stoll, at Marshfield, Oregon, the following letter:

"Portland, Oregon,
April 20-14.

"Hon. Wm. T. Stoll,
Marshfield, Oregon.

"My Dear Stoll:

In Re-setting Cases.

"The following cases in which I am interested were set today by the United States Court, in the following order, and which was the earliest time I could get.

1. Stipel vs. Gustafson, June 11, 1914.
2. Conley vs. S.P.Co., June 12, 1914.
3. O'Harra vs. Lewis A. Hicks Co. follows the Conley case.
4. Parker vs. C.A. Smith Lumber Co., June 17 1914

5. Marttila v. Coos Bay Pulp & Paper Co, June 18, 1914.

6. Aho vs. Willett & Burr, June 19, 1914.

The Manika case was not set.

Now from the dates above given you can see that I have monopolized the time from about the 11th to the 20th of June. If you wish your three cases to come first, or if you wish them set in different order, you will please let me know and I will switch my other cases to suit you, as the other cases are by local counsel and they will agree, I am satisfied.

"On the 28th of this month the Breakwater goes to a five day schedule, and if you will check from the 28th you will find that this will give us one day or so within which to marshal our testimony in the given cases and we will certainly need this much time. The Breakwater should arrive here Monday the 15th, and this will give us Tuesday the 16th and we will start into the fight Wednesday the 17th.

"Yours truly."

Thereafter I wrote and mailed the following letter to Honorable John D. Goss, Marshfield, Oregon, to-wit:

"Portland, Oregon,
April 21st, 1914.

"Hon. John D Goss,
Marshfield,
Oregon.

"Dear Sir:

In the several cases which you have against Mr. Stoll together with some other cases which I have,

the court on yesterday set them in the following order for the following dates:

1. Stipel vs. Gustafson, June 11, 1914.
2. Conley vs. S. P. Co., june 12, 1914.
3. O'Harra vs. Lewis A. Hicks Co., follows Conley case.
4. Parker vs. C.A. Smith Lumber Co., June 17, 1914.
5. Marttila vs. Coos Bay Pulp & Paper Co., June 18, 1914.
6. Ahi vs. Willett & Burr, June 19, 1914.

“You will observe that the three first named cases which I have are ones in which neither you or Mr. Stol have any interest. I have given you the dates of them, however, so that you and Mr. Stoll may confer concerning the several cases which you respectively have against each other and so you may arrange the cases in any of the dates above specified to suit the convenience of yourselves.

I wrote Mr. Stoll concerning these dates on yesterday and I would ask you to take the matter of the order of the trials as well as the respective dates up with Mr. Stoll and let me know if present arrangement is satisfactory.

“With best wishes, I am, Yours truly.”

Thereafter and in due course I received from William T. Stoll a letter under date of April 22nd, 1914, reading as follows:

"I. S. Smith, Esq.,
Corbett Bldg.,
Portland, Oregon.

"My Dear Ite:

Re-setting Cases.

"Your setting of the cases is all right. We will let her go just as she stands. Yours very truly,
W. T. Stoll."

Thereafter in due course I received from Honorable John D. Goss the following letter, dated Marshfield, Oregon, April 24, 1914, to-wit:

"Littlefield & Smith,
Portland, Oregon.

Re Aho and Parker cases.

"Gentlemen:

Your letter of April 21st, giving us the dates of the various cases in which we are both interested in Portland, is at hand, and so far as present indications show these dates of trial will be very satisfactory.

"I have spoken to Mr. Stoll regarding the same, and he also appears to be satisfied, so that you merit the thanks of both of us for whatever you have done to bring about this result.

"I take it that any arrangement or stipulation I may make with Mr. Stoll will be entirely satisfactory to you with regard to any of these cases.

"Again thanking you for your continued courtesy in this and other matters, I remain, Very truly yours,
John D. Goss." "G:J"

I did not thereafter at any time whatsoever, or at all, agree with Mr. Goss or anyone for him, to change the date of these trials.

Sometime in the month of June, and several days prior to the trial, the exact time I do not remember, I met Mr. Goss and incidentally the question of the order of trials came up. At that time I reiterated to him that the order of trials was entirely between him and Mr. Stoll. He did not at that time request any change in the schedule, nor claim that he could not be ready in the cases as they were set.

Thereafter and on June 17th, 1914, the case of John A. Parker vs. C. A. Smith Lumber & Manufacturing Co. was called for trial in the above court, and prior to proceeding with the trial his Honor, Judge Bean, called the title and asked if the plaintiff was ready for trial, whereupon the attorneys for plaintiff, to-wit, myself and Mr. Stoll being present in court notified the court we were ready. Thereupon the Court asked if the defendant was ready for trial, whereupon the defendant, represented by Mr. Goss, who was then in court, stated the defendant was ready.

At the time the case was called for trial there was no request for postponement. On the contrary, the defendant announced that it was ready for trial.

The journal entry of the commencement of said trial is as follows:

“Law Journal No. 24, page 21. 93rd day March Term, June 17, 1914. B. & W.

John A. Parker vs. C. A. Smith Lumber & Manufacturing Company. No. 6240. June 17, 1914.

“Now at this day come the plaintiff, by Mr. I. N. Smith and Mr. William T. Stoll, of counsel, and the defendant by Mr. John D. Goss, of counsel, and this being the day set for the trial of this cause, now come the following named jurors to try the issues joined, viz., W. R. Winans, A. C. Libby, E. J. Roth, A. H. Averill, O. B. Molmsten, W. J. Wiley, Ed. Weaver, C. L. Hattenburg, Jasper N. Bellinger, J. S. Dunnivan, P. J. Conn and Fingal Hinds, twelve good and lawful men of the district, who being accepted by both parties, who being duly empaneled and sworn, proceed to hear the evidence adduced and the hour of adjournment having arrived it is ordered that the further trial of this case be continued until tomorrow, June 18th, 1914, at ten o'clock A. M.”

Affiant further says that on the first day of said trial the jury was selected, the opening statements of respective counsel were made, the plaintiff presented his evidence and closed his case, and three witnesses for the defendant, to-wit, A. Mareen, A. L. Butts and F. Kester were called, sworn and testified for the defendant.

On the 17th day of June, in adjourning for the noon hour the Court adjourned for 1:30 P. M. in order to expedite the trial of the above cause. I remember the occasion, because I misunderstood the hour of adjournment and caused ten minutes delay.

On the opening of Court on June 18th counsel for the defendant, Honorable John D. Goss, at the opening of Court, had some colloquy with the Court relative to the non-arrival of some of his witnesses, but the

stenographic record shows the following statements to have been made by him at that time:

“Portland, Oregon, Thursday, June 18th, 1914,
10 A. M.

“Mr. GOSS: I have to say that four of our witnesses, something has happened to them, I don’t know what. They didn’t get into Roseburg in time to catch the train and didn’t get in in time to catch the night train. I have a telegram from Roseburg that they got in at four o’clock. It embarrasses me to have to ask for any leniency in this case.

THE COURT: I don’t know, Mr. Goss. It seems to me you will have to proceed with the trial of the case. I don’t see how we can postpone it until that time. It will take them all day to get down here, if they started in an automobile.

Mr. GOSS: My advices are they should be here for the afternoon session, if they left there by four o’clock in the morning and the roads are fairly good.”

Thereupon the trial proceeded. The defense called Dr. E. Menzies, who testified on behalf of the defendant, and thereupon the defendant rested, and thereafter the rebuttal testimony of plaintiff was introduced and the rebuttal witnesses used were John A. Parker and John F. Bane, and thereupon the defendant called A. Mereen in sur-rebuttal, also A. L. Butts in sur-rebuttal, also F. Kster in sur-rebuttal; and thereafter the case was argued to the jury and thereafter the jury was instructed and retired for their consideration.

Before the closing of the case and after F. Kester, the last witness in sur-rebuttal called by the defendant, had testified again, the defendant, through Mr. Goss, made the following statement, which appears in the stenographer's record:

"Mr. Goss: May it please the Court, I wish it to appear in the record on this application for delay that the witnesses I am waiting for are Mr. Dresser, Mr. Mathewson and Mr. Roarke, and I presume it is possible at this time to make a motion for a directed verdict in this case."

"The Court: Very well. You can have the record show that. I think there is testimony enough to go to the jury."

Affiant further states that at no time did the said John D. Goss claim or intimate that he was unable, by any fault of the plaintiff or his attorneys, or because he relied upon any purported agreement with anybody representing plaintiff, that his witnesses were delayed or would not arrive, nor did he claim at the trial at any time, nor in his application for continuance until his witness could arrive, that the plaintiff had misled him in any manner.

On the other hand, affiant states that the said John D. Goss knew from April 24th, 1914, that the case above entitled was set for June 17th, and had ratified it, and at no time did the said John D. Goss ever ask me to change the date. He had been informed in my letter that the matter of the date was between him and Mr. Stoll, and that the said John D. Goss was in Portland, Oregon, sometime prior

to the actual trial of the above case, and after the fourth day of June, the exact date affiant does not remember, at which time affiant met Mr. Goss and casual reference was made to the trail of these cases, and I then told him that I would be ready to try them in the order in which they were set unless changed by him and Mr. Stoll.

At no time did William T. Stoll, with my knowledge, ever agree to any change in the arrangements, but, on the contrary, the said William T. Stoll and the said John D. Goss both admitted they were satisfied with the dates in the letters above referred to.

Affiant further says that the failure of the said witnesses to arrive in time for the trial was not due to any fault, neglect, stipulation, misrepresentation or artifice on the part of the plaintiff or his attorneys in any manner or way whatsoever or at all.

Affiant refers to the affidavits on behalf of the defendant in support for its motion for a new trial, as follows:

Affidavit of John D. Goss, page 1: "That I notified the witnesses in the several cases to be tried in the above entitled court to be present in Portland on the 17th of June. That I was occupied in the trial of a case in the Supreme Court of the State of Oregon until late in the afternoon of the 16th day of June; that on returning to Portland I discovered that all the witnesses required in the above entitled case had not appeared, and that early on the morning of June 17th I called up the attorneys for the plaintiff and requested that the trial of the above entitled

case be postponed until after the trial of the next succeeding cause, i. e. the case of Marttila vs. Coos Bay Pulp & Paper Company, in which they appeared as attorneys for the plaintiff and I appeared as attorney for the defendant, but they then informed me that they would not consent to a change at that time. That I immediately, or as soon thereafter as possible, got into communication with the defendant company in the above entitled cause and had the remaining witnesses, of whom I had any knowledge at that time, to-wit, F. H. Dresser, Burnt Mathewson and George Roarke, at once to start in an automobile for the railroad at Roseburg; that their delay in coming was occasioned by the understanding of the defendant that this trial should be postponed to the trial of the other cause, and to the fact that I was not present at Marshfield at the time, and the further fact that communication with Marshfield is very difficult, uncertain and hard to understand and that telegraphic communication is somewhat slow and uncertain."

From the affidavit of Burnt Mathewson I quote the following:

That in company with George Roarke and F. H. Dresser and the chauffeur we left Marshfield, Oregon, at one o'clock June 17th, by automobile, for Roseburg, in order to catch a train for Portland so that I might be present and testify in the foregoing entitled action on behalf of the defendant on the morning of the 18th;

“That under ordinary conditions we would have readily reached Roseburg in ample time to have taken the evening train for Portland, but that we became stalled in what is known as the Canyon on said road and it required eight hours for us to travel four miles of said road, and although we worked hard and continuously we did not reach Roseburg until about four o’clock in the morning of the 18th,” etc.

I further quote from the affidavit of George Roarke in support of the defendant’s motion for a new trial, as follows:

“That in company with George Roarke and F. H. Dresser and the chauffeur we left Marshfield, Oregon, at one o’clock June 17th by automobile for Roseburg in order to catch a train for Portland so that I might be present and testify in the foregoing entitled action on behalf of the defendant, on the morning of the 18th.”

“That under ordinary conditions we would have readily reached Roseburg in ample time to have taken the evening train for Portland, but that we became stalled in what is known as the Canyon on said road,” etc

I further quote from the affidavit of F. H. Dresser, filed by the defendant in support of said motion, to-wit: “That on the 17th day of June, 1914, together with Burnt Mathewson and George Roarke we started from the city of Marshfield with an automobile and the chauffeur at one o’clock P. M., in ample time to have reached Roseburg and to have

caught the 11:15 P. M. train for the City of Portland, which would have brought us to the City of Portland early in the morning of the 18th of June; that said automobile was stalled in what is known as the Canyon on said road to Roseburg," etc.

Affiant further says that he is informed by said affidavits and believes and charges and states the truth to be, that the failure of the witnesses to arrive at the above trial was because their automobile broke down and not because the defendant was misled by any act of the plaintiff.

Affiant further says that the defendant had ample time, to-wit, from April 24th, 1914, to have prepared for the above trial, and that in the affidavit of the attorney for the defendant, to-wit, the affidavit of John D. Goss, he states,

"That I notified the witnesses in the several causes to be tried in the above entitled court to be present in Portland on the 17th of June."

Affiant says that the failure of the said witnesses to be present on the 17th was due to the inexcusable neglect of the defendant and its said witnesses, and that the failure of said witnesses to be present in said court was not attributable to any fault, statement, agreement, either express or implied, or other attitude of this plaintiff or his attorneys in any way whatsoever or at all.

From the affidavit of John D. Goss relative to the failure of the said witnesses I quote the following:

"That I did not know the plaintiff would deny the statements which these witnesses claimed he had made to them."

The same affidavit has previously recited as follows, to-wit:

“That I notified the witnesses in the several cases to be tried in the above entitled Court to be present in Portland on the 17th of June.”

And in the affidavits of Mathewson, Roarke and Dresser it appears that these men left Marshfield at one o'clock P. M. of June 17th, 1914.

That the cross-examination of John E. Parker began at the afternoon session of June 17th, 1914; that Court adjourned at noon to meet at 1:30 P. M.; that the actual cross examination did not begin until 1:40 P.M. as by my misunderstanding of the hour of meeting neither Mr. Parker, nor Mr. Stoll, nor his witnesses arrived until about 1:40; that Mr. Parker was not asked relative to statements purported to have been made to the witnesses Mathewson, Fred Moore, Dresser or Roarke until the morning of June 18th, 1914, on cross-examination of John A. Parker in rebuttal, as appears at pages 104 and 105 of the transcript.

Answering the reply affidavit of John D. Goss I state that sometime several days and long prior to the trial of the above cause, and between the 4th and the 17th of June, I had a talk with John D. Goss wherein I informed him that as far as I was concerned any arrangement of the cases which he and Mr. Stoll might make would be satisfactory; that I had nothing to do with the arrangement of the cases definitely; that that matter was between him and Mr. Stoll.

The purport of the conversation was as above stated. I did not at any time represent to him or state to him, or lead him to believe, that I had any control over the changing of the cases.

John D. Goss did not call me up at my office over the telephone on the 17th day of June in the morning relative to these cases. He called me by phone on the 16th of June and wanted to know how the cases would be tried, and I told him then that the Parker case would be tried first, and the cases would be tried as they were set. He did not at that time request that the order of trials be changed. He did not at any time request of me that the Marttila case be tried before the Parker case.

The purport of my telephonic conversation with Mr. Goss was as above stated. At no time did he ever claim to be misled, deceived or taken at an unfair or undue advantage, and the affidavit of his witnesses shows that they left Marshfield in plenty of time to be in Portland in time for the Parker case.

As to the purported telephonic conversation of June 17th, 1914, before this case was called John D. Goss did not call me on that morning. He talked with me some as to the order of the cases. I did not at any time tell William T. Stoll that John D. Goss had demanded that the Marttila case should be tried before the Manika case. I spoke to Mr. Stoll about the order in which the cases would be tried, and he stated, "In the order they were set," and that is what I informed Mr. Goss over the phone. Mr. Goss did not demand that the cases should be changed in their place. He asked me which case

would come up first, and I told him, after referring to Mr. Stoll, the Parker case.

If John D. Goss had ever requested me to change the date of the trial he would have received the same information which my letter of April 21st, above set out, contained, to-wit, that the order of the trial was between him and Mr. Stoll.

Affiant therefore says that there was no accident or surprise in the fact that this case was tried on the day it was set, to-wit, June 17th, for the reasons above stated and for the reason that the trial had been set for such date for approximately two months before it was had.

And further affiant saith not.

ISHAM N. SMITH,

Subscribed and sworn to before me this July 27th, 1914.

[Seal]

E. V. LITTLEFIELD,
Notary Public for Oregon.

Filed July 27, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on Monday, the 3rd day of August, 1914, the same being the 25th Judicial day of the regular July, 1914, Term of said Court; Present: the Honorable ROBERT S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Denying Motion for New Trial.

In the District Court of the United States for the District of Oregon.

No. 6240.

August 3, 1914.

JOHN A. PARKER,

v.

C. A. SMITH LUMBER and MANUFACTURING
COMPANY.

This cause was submitted to the Court upon the motion of the defendant for a new trial herein, and was argued by Mr. I. N. Smith, of counsel for the plaintiff and by Mr. John D. Goss, of counsel for the defendant; on consideration whereof, it is Ordered and adjudged that said motion be, and the same is hereby denied.

And afterwards, to wit, on the 3rd day of September, 1914, there was duly filed in said Court, a Bill of Exceptions, in words and figures as follows, to wit:

Bill of Exceptions.

In the District Court of the United States for the District of Oregon.

JOHN A. PARKER,

Plaintiff.

vs.

C. A. SMITH LUMBER and MANUFACTURING
COMPANY, A Corporation,

Defendant.

BE IT REMEMBERED: That on the 17th day of June, 1914, the above entitled action came on for trial before the above court and a jury duly empanelled.

Honorable Robert S. Bean, District Judge, presiding.

Plaintiff appeared by W. T. Stoll, and I. N. Smith, his counsel; and the defendant appeared by John D. Goss, its counsel: and the following proceedings were had:

The plaintiff John A. Parker was then called as a witness in his own behalf, and testified that while he was in the employ of the defendant company he received an injury, and that subsequently he made settlement with said company through Mr. Mereen, the general superintendent, by the terms of which it was agreed that defendant should pay plaintiff a certain sum of money and give him employment (a job) in its mills as long as he wanted it.

On cross examination he testified that as a part of said settlement he signed a written document which was offered and received in evidence, marked [Defendant's Exhibit A], which said Defendant's Exhibit A was in the words and figures following:

“For the sole consideration of the sum of Four hundred ten and 75-100 Dollars, this 25th day of September, 1909, received from C. A. Smith Lumber & Mfg. Co. I do hereby acknowledge full satisfaction and discharge of all claims, accrued or to accrue, in respect of all injuries, or injurious results, direct or indirect, arising or to arise from an accident sus-

tained by me on or about the 16th day of December, 1908, while in the employment of the above.

\$410 75-100

[Signed]

J. A. PARKER [Seal]

Witness, ARNO MEREEN,

Address, Marshfield

Witness, DAVID NELSON

Address, Marshfield

John F. Bane was then called as a witness in behalf of the plaintiff, and after he had testified, the plaintiff rested his case.

The defendant thereupon moved for a nonsuit and a dismissal at that time on the ground that plaintiff had failed to make out a case, in that, in the first instance, he had failed to show that there was any liability or any valid claim in law, as between plaintiff and defendant company, upon which a settlement could be made, or as a basis of settlement; that is that the plaintiff had failed to show that he had any claim against the company whatever, and that the settlement, or promise, or agreement, or whatever it may be termed, was without consideration on the part of the company and was voluntary; and such motion for nonsuit was based upon the further ground that plaintiff had failed to show that there was any agreement, distinct from the written agreement itself, distinct from the voluntary promises whereby he was to be continuously employed; and such motion was based on the further ground that the plaintiff's own evidence showed that he voluntarily ceased employment, which act would terminate

any agreement that there might be: which motion the court then and there overruled, to which ruling the defendant excepted, which said exception was allowed.

A. Mereen, A. L. Butz, and F. Kester were then called and testified on behalf of the defendant.

The trial of said action was then adjourned until the following morning, to-wit, Thursday, June 18, 1914, at 9:30 A. M., and at said time the defendant notified the court that four of defendant's material witnesses, who were expected to testify at the trial, had been unavoidably delayed by an accident, and by reason thereof had failed to get into Roseburg in time for the afternoon train for Portland, and that they expected to arrive in Portland in time for the afternoon session, and for these reasons defendant requested a postponement of the trial until the afternoon of said June 18th, which motion the court thereupon overruled, to which ruling the defendant excepted, which exception was allowed.

Dr. E. Mingus was then called as a witness on behalf of the defendant, but his evidence was ruled out as incompetent and by reason of the absence of defendant's witnesses as aforesaid, and the court's refusal to grant a continuance until their arrival, defendant was compelled to, and did rest its case.

John A. Parker and John F. Bane were recalled in rebuttal on behalf of the plaintiff, and A. Mereen, A. L. Butz, and F. Kester, were recalled in surrebuttal on behalf of the defendant.

The defendant thereupon renewed its motion for a continuance until the arrival of three important and material witnesses on behalf of the defendant, nameley Dresser, Matthison, and Rourke, which motion was overruled, to which ruling of the court defendant thereupon excepted, and said exception was allowed.

Both sides then rested, and the defendant requested the court to instruct the jury to find a verdict in favor of the defendant, which instruction the court refused to give the jury, to which refusal and ruling defendant excepted, which said exception was allowed.

The defendant then requested the court to give the jury the following instructions:

“Before you may find a verdict for the plaintiff in this case, it is necessary that you find, gentlemen of the jury, that there was a contract between the plaintiff and the defendant, whereby the defendant agreed for a condiseration, to give the plaintiff employment, as long as the plaintiff desired it,” which instruction the court refused to give the jury, except as contained in the general charge, to which ruling the defendant excepted, which exception was allowed.

The defendant then requested the court to give the jury the following instructions:

“If you find that there was such a contract, you must also find that that contract was still in existence at the time when the defendant refused to employ the plaintiff”, which instruction the court refused to give the jury, except as contained in the

general charge to which ruling the defendant excepted, which exception was allowed.

The defendant then requested the court to give the jury the following instructions:

“In this connection, there has been evidence introduced going to show that the plaintiff, of his own accord, quit work for the defendant, and you are instructed that if you find from the preponderance of the evidence that the plaintiff, of his own accord, quit working for the defendant, whether it was for the purpose of procuring higher wages, or whatever his motive may have been, then such act on his part terminated any contract or liability on the part of the defendant to furnish the plaintiff with employment, and the discharge of the plaintiff by the defendant thereafter, or the refusal of the defendant thereafter to employ or continue to employ the plaintiff would not render the defendant liable in damages therefor. And if you find such to be the facts, your verdict should be for the defendants,” which instruction the court refused to give the jury, except as contained in the general charge, to which ruling the defendant excepted, which exception was allowed.

The defendant then requested the court to give the jury the following instruction:

“In determining whether or not a contract for employment such as the plaintiff claims herein existed you are to be governed by the final agreement that was actually made in settlement of the claims of the plaintiff, and although the plaintiff may have

been promised work by the defendant upon numerous prior occasions, such promises would be mere inducements, without consideration, and would not of themselves make a contract, nor would they by reason of having been repeatedly made during the negotiations, be for that reason alone a part of the contract of settlement," which instruction the court refused to give the jury, except as contained in the general charge, to which ruling the defendant excepted, which exception was allowed.

The defendant then requested the court to give the following instruction:

"The defendant under the pleadings herein, and under the facts as disclosed in the evidence, would not be responsible for the acts of the physician, Dr. Dix, nor for his failure to properly care for the injuries of the plaintiff, if he did so fail to care for the plaintiff, but under the relationship between the plaintiff and the defendant, it was incumbent on the defendant only to use proper care in the selection of a physician, and if they used reasonable care in selecting a physician, and the physician so selected was one of good reputation and ability, the defendant's full duty was performed, and the defendant could not be held responsible for any specific acts of negligence or mal-practice of which the physician might be guilty," which instruction the court refused to give, except as contained in the general charge, to which ruling the defendant excepted, which exception was allowed.

The defendant then requested the court to give the jury the following instructions:

“If you find from the preponderance of the evidence in this case, therefore, that the defendant had used due care in the selection of a physician, and that the claim of the plaintiff with regard to his injury was based upon the neglect or mal-practice of the physician, then I instruct you that such a claim would not be a valid claim as against the defendant, and the settlement thereof could not be the basis of a contract or compromise between the plaintiff and the defendant, and any promise of the defendant with regard thereto made to the plaintiff would be without consideration and not binding in law, and the failure of the defendant to keep such promise, even though you find such failure, would not render the defendant liable in damages to the plaintiff herein,” which instruction the court refused to give the jury, except as contained in the general charge, to which ruling the defendant excepted, which exception was allowed.

The Court then gave the jury the following among other instructions:

“Now there is some evidence on behalf of the defendant tending to show that after the plaintiff had worked for the defendant for a certain time, he quit or ceased work in order to obtain higher wages, and that he made, or attempted to make arrangements with some other employes not to take his place, in order to force the company to increase his compensation. Now, if he did that, that would be a breach of his agreement, if there was one. The Company agreed, according to his statement to give him em-

ployment as long as he wanted it, and that obligated him to continue in the employment unless the cessation was due to some physical acts, I suppose, like illness or something of that kind, or by mutual consent. He might take a lay-off, if the company consented to it or it was agreeable to them, but he couldn't use that contract as a means of forcing or compelling the company to increase his wages. Whether he did that or not, is a question of fact, there is a dispute as to that, and that also is a question." To which instruction defendant excepted, which exception was allowed.

The jury then retired, and after a short absence returned into court a verdict in favor of the plaintiff for damages in the sum of Twenty-five Hundred Dollars (\$2500.00).

For the purposes of the propositions raised by the refusal of the court to grant defendant's motion for a non-suit, and the court's refusal to instruct the jury to bring in a verdict for the defendant, there is attached to this bill of exceptions, marked [Exhibit A], hereby referred to and made a part hereof, a transcript of all the evidence offered and received at the trial of said cause, and the instructions of the Court to the jury.

Thereafter, and after the verdict was rendered in favor of the plaintiff, and the judgment of the court was entered upon the verdict in favor of the plaintiff, the court by order duly entered, extended the time within which the defendant might submit a bill of exceptions to sixty days from the date of

said judgment, to-wit, until the 17th day of August, 1914, and subsequently, to-wit, on the 17th day of August, 1914, a further order was duly signed and entered by the court, extending the time within which the defendant might prepare, file, and serve its bill of exceptions, up to and including the 27th day of August, 1914.

AND NOW, IN furtherance of justice, and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and prays that the same may be settled and allowed, and signed and certified by the judge as provided by law.

JOHN D. GOSS

Attorney for Defendant.

United States of America,
District of Oregon,—ss.

I, Robert S. Bean, Judge aforesaid, before whom the foregoing action was tried, hereby certify that the foregoing bill of exceptions is by me examined, allowed, and settled, this 3rd day of September A. D. 1914; and I further certify that Exhibit A attached to and made a part of this bill of exceptions contains all of the evidence offered and received during the trial of said action, and the instructions of the court to the jury.

R. S. BEAN

District Judge.

(Testimony of John A. Parker.)

Exhibit "A."

JOHN E. PARKER.

The plaintiff, being first duly sworn, testified in his own behalf, as follows:

DIRECT EXAMINATION.

Questions by Mr. Smith:

Q. Where do you live, Mr. Parker?

A. Florence, Oregon.

Q. You are the plaintiff here, are you?

A. Yes, sir.

Q. And what is your age, please?

A. About thirty-two.

Q. Prior to your injury what was the condition of your health and physical ability? A. Good.

Q. What is your condition of health and ability to run the trimmer now?

A. Good condition.

Q. Now, you were a mill-wright by occupation, were you? A. Yes.

Q. How many years apprenticeship did you serve?

A. Oh, I worked at the business about twelve or fourteen years, somewhere along there.

Q. How long?

A. Up to the time I got crippled, I say.

Q. How long did you work for the C. A. Smith Company this defendant, before you got hurt?

A. Somewhere round about six years.

Q. Down there at Marshfield? A. Tes.

(Testimony of John A. Parker.)

Q. What were you doing for them?

A. I worked on the construction of the mill from the start to the finish.

Q. Do you remember about the time you were hurt? A. Yes, sir.

Q. When was it please? A. 1908.

Q. And did you acquaint them with the fact that you were hurt? A. Yes, sir.

Q. Now, while you were working for them what sum if any did they deduct from your wages for this hospital fee, as they call it?

A. A dollar a month.

Q. After you were hurt what doctor did you report to for treatment?

A. Dr. Dix, George E. Dix.

Q. How did you come to go to him for treatment?

A. Why, you pay a dollar a month for his services.

Q. And what application if any did you suffer from during the treatment?

A. Lost the hand by his treatment.

Q. Well, state whether or not blood poisoning set in.

A. Yes, blood poisoning set in the hand.

Q. And do you know why your hand was cut off?

A. Caused by the blood poisoning.

Q. Seemed to settle there, did it? A. Yes, sir.

Q. Did you attribute that to the injury you received, as one of the results of it? A. Tes, sir.

Q. Did you let the C. A. Smith Company know that you claimed they were responsible for the loss of your hand?

(Testimony of John A. Parker.)

A. Yes, sir.

Q. And what if anything did they claim about it? Did they affirm or deny it?

A. Yes, sir, they affirmed it.

Q. Now, then did you have any settlement of your matter with them, arising out of this personal injury? A. Yes, sir.

Q. Now, I wish you would speak up distinctly; it is a little hard to hear in this room. Just talk up like you would on the work there, and tell us now all about that settlement, where it was, when it was, who were present, and what they agreed.

A. Well, after I got hurt in the mill, why I called Dix and he attended to me. He didn't come up the night I called him; he said he would come up the next morning, and he came up the next morning and dressed my leg, and he said it would either turn off to a boil or an abcess, where I got hurt would, and-oh it went on for a few days, and a king of tingling pain between my two fingers, and after I got so I could get down town, I met him on the street, and told him about this pain in my fingers, but he said nothing to it; he says "That is just rheumatism." I went home then. He gave me a bottle of some kind of fluid to rub in the outside of the hand.

Q. I think you have given the result of that. Your hand was amputated finally because of blood poisoning: A. Yes, sir.

Q. Now, the question I asked, just to get along with the matter, was for you to tell what conver-

(Testimony of John A. Parker.)

sation you had when you made this settlement, and who it was with and where it was.

A. Along in May I got so I could go to the office.

Q. What year was that please?

A. That was 1909.

Q. Go right ahead.

A. And I met, I think, Mr. Smith first.

Q. Who was Mr. Smith?

A. C. A. Smith, president of the company

Q. The company you worked for?

A. Yes. Yes, I met him down in the mill and shook hands with him; told him I got hurt; how it happened, something, and we we talked a little while and I don't think—I met him the next day then before I met Mr. Mareen; he talked to me, and he says "you talk with Mr. Mareen; anything he says goes" he says. "You make a settlement with him in regards*———

Q. Mr. Smith told you that?

A. Yes, sir.

Q. Did you afterwards see Mareen?

A. I did.

Q. Where and when? Who was Mr. Mereen at that time What position did he hold.

A. Mr. Mareen was superintendent; genera; superintendent.

Q. Of the mill? A. Of the mill.

Q. Do you know what position he held in the corporation?

A. Well, he may have been vice-president; I don't know at that time or not.

(Testimony of John A. Parker.)

Q. But you do know he was superintendent of it?

A. Yes, sir.

Q. He was the same man Mr. Smith referred you to, was he? A. Yes, sir.

Q. Now, go on and tell your transaction with him.

A. He said he would like to have a settlement didn't want to have any trouble about it; said he did n't know as the company was to blame. Wanted to know what I would do, what I would take. I told him I didn't know what it would—what I would take, so—oh, we had several conversations and at last he says he would give me half-time; that was the best he could do, and he says "We will give you a job." Well, I says probably the company will break up, something like that and I wont have no job; well, he said "We will give you a job as long as the company holds together, or as long as you want it." That is just about the words he used.

Q. Did you make this settlement?

A. We made this settlement.

Q. Did you accept that?

A. No, I didn't accept it at that time, so I said I would think it over and see. I said "How about this doctor bill; I got another doctor on it" I says to him. Well, he says "We will pay the doctor bill." I also put up about the medicine I used, another drugstore; he said they would settle for that too; So, I went to work; I went to work in the meantime, if I remember right, and I worked a little over a month on the trimmer, helper; I was on the big trim-

(Testimony of John A. Parker.)

mer at that time; they had no air; they had no air at that time, so I went as a helper. I worked about a month or a little over and took an attack of appendicitis. I was laid up some little while. At that time I had no—I didn't have a settlement.

Q. That was before the settlement?

A. That was before the settlement; we had talked the thing up before that but we hadn't settled, so I didn't go to their doctor again. I went to another hospital and had an operation for appendicitis, and was laid up probably three months, something like that, and I came back and on my return they put me in as foreman taking machinery out of the Bay City Mill, and I filled the position until the mill was ready to work, that is run the yard, kind of straw-boss, and I went on as time-keeper, and I filled that position until they started up, started up the mill, then I went and filled the position as trimmer man there for about three years.

Q. Now, let's come back to the actual date of the settlement. You say that was after you had been operated on for appendicitis?

A. Yes, sir.

Q. Now, at the time of your settlement or after you came back, did you have any further conversation with Mareen?

A. Yes, sir.

Q. Talked this over with him again?

A. We talked this all over again.

Q. And do you remember the date that you signed this release that has been read?

(Testimony of John A. Parker.)

A. Sometime in September, I think. I don't remember the date.

Q. And what were the ultimate promises, what were the promises that were made to you for the settlement, if any?

A. Well, to give me this doctor bill, hospital bill, and \$200; and after we got through talking, I says to Mr. Mareen, I says: "Now to be conscientious and not to blame the company, who do you think is to blame for the loss of my hand? Don't you think Dix is" Well, he says: "I believe Dix is somewhat the cause of your losing your hand."

Q. And how many conversations did you have with him, if you remember, about the employment that he was to give you?

A. I had a number.

Q. What was the final settlement as to employment?

A. He partly promised me the position as foreman of the Bay City Mill when they started that up. When the time came there was another man put in the position. I told him that I thought I would be able to handle that job, but this fellow had a better pull than I had, so he got it and they put me in this trimmer job.

Q. And what statement if any did they make to you at the time this release was signed about giving you a job and what kind of a job?

A. Said would always give me a job and something better than common work.

(Testimony of John A. Parker.)

Q. That was part of the whole settlement?

A. Yes, sir.

Q. How long did you work for them?

A. Altogether?

Q. Yes. A. I worked about six or seven weeks.

Q. I mean after you got hurt; after you made this settlement how long did you work for them?

A. I worked for them until after my brother got killed, after I brought this trial. I forget now the date.

Q. How long did they tell you before the settlement you might have the job for?

A. As long as I wanted it.

Q. Now, after you started work there what different positions did you fill?

A. Well, first I went on as helper in the trimmer box; then I took appendicitis and came back and went on as foreman, then as time-keeper and from that to trimmer-man.

Court: Talking of working before or after the settlement?

A. After the settlement.

Court: You had appendicitis before the settlement.

A. Yes, before the settlement.

Court: He is asking what work you did after the date of settlement.

A. This was after the date of settlement, this work.

(Testimony of John A. Parker.)

Q. You filled various places there after that, did you?

A. Yes, sir.

Q. What wages did they pay you?

A. Excuse me a minute. I was helper on the trimmer before my operation for appendicitis.

Court: That was before the settlement?

A. That was before the settlement. We had talked the thing up before that.

Court: But you didn't have the settlement until after you came back from the——

A. Appendicitis.

Q. State whether you accepted that settlement on the understanding and promises he had made you as well as the other consideration?

A. Yes, sir. It was the understanding I was to keep employed.

Q. What work were you given after you went back after settlement? What different positions?

A. Well, I was foreman of the yards.

Q. What did you get at that service? A. \$3.00.

Q. And what other place did you fill?

A. Time-keeper.

Q. What did you get there? A. \$3.00

Q. What other place did you fill?

A. Trimmer.

Q. What did you get there? A. \$3.00

Q. What kind of trimming table did you work on there, a regular table, or not?

A. I worked both; first the levers, then got the air.

(Testimony of John A. Parker.)

Q. What did they do if anything with relation to changing the table or fixing it so you could work with one hand?

A. Mr. Mareen said he put that trimmer in there a-purpose so I could run it.

Q. Was it put there actually? A. Yes, sir.

Q. Your table is a little different than the others?

A. Practically the same; they have others like it now. It was different from the others then.

Q. The one you worked on then? A. Yes.

Q. Was the table at which you worked a table at which you could do the work they required?

A. Yes, sir.

Q. Do a full day's work? A. Yes, sir.

Q. When was it that you were discharged by the company?

A. I was discharged when I came back from the trial of my brother.

Q. Now, without going into the details of the case, or anything of the kind, had your brother been working for them before he was killed? A. Yes, sir.

Q. And you were appointed administrator?

A. Yes, sir.

Q. And you brought action on account of his death? A. Yes, sir.

Q. And sued the company. When was it you were discharged

A. Sir?

Q. When was it you were discharged? What day? What year?

(Testimony of John A. Parker.)

A. I was discharged, well I couldn't tell you the date but it was right after my brother's trial.

Q. What year was it, last year?

A. No, year before, 1913, I think.

Q. 1913. Do you remember about what month?

A. I think it was in January.

Q. January. Now who discharged you down there?

A. The foreman.

Q. What is his name?

A. His name was George Rourke.

Q. During all the time you were there, was Mr. Mareen in the same position that he was when you made the settlement?

A. Yes, I guess—yes, sir, I guess he was.

Q. Did he know you were working there? Did he know about your work?

A. Oh yes, come around and see me pretty often.

Q. At the time you were discharged, what statements were made to you for discharging you?

A. Well, I asked Mr. Rourke what was the matter. Well, he said Mr. Mertz, that is the superintendent, the regular superintendent, he said he came over and told him to tell me "When you come back there is no work for you."

Q. Did he say why? A. He didn't say why, no.

Q. Have you offered to go back to work for them since? A. Yes.

Q. And what was the answer?

A. Well, they said nothing for me to do.

Q. Did they tell you why?

(Testimony of John A. Parker.)

A. Well, they said that I was——

Court: Who was he?

Q. Who was it you were talking with?

A. I went to see Mr. Mareen.

Q. You saw him personally? A. Yes, sir.

Q. Did you talk over the matter of your further work there with him?

A. Yes, I talked with him about it. He told me that I brought a case against them for my brother's death; said he couldn't keep me employed.

Q. Mareen told you that? A. Yes, sir.

Q. Now then, at that time when you wanted to go back to work what was your physical condition as to being able to go ahead and do your work?

A. I have always been in condition to go back.

Q. Have you been able to follow that occupation anywhere else, Mr. Parker?

A. Well, can't get a job anywhere else, a man that is crippled.

Q. What have you been doing since you were discharged?

A. Why my wife has a confectionery store in Florence.

Q. You help her run that, do you? A. I do.

Q. Do you own that or does she?

A. She owns it.

Q. The reason I ask you that it the charge is made that you are still making three dollars a day—charged in the answer. Tell the jury about how much you make there in that little store?

(Testimony of John A. Parker.)

A. Just make a bare existence.

Q. I thought I had asked you the question as to how long, if at all, they told you this job would last, when they made the settlement.

A. Told me it would last as long as I wanted the job.

Q. Now, that I understand was a part of the promises upon which you made the settlement?

A. Yes, wit.

Whereupon proceedings herein were adjourned until 1:30 P. M.

Portland, Oregon, Wednesday, June 17, 1914, 1:30 P. M.

JOHN E. PARKER resumes the stand.

CROSS EXAMINATION.

(Questions by Mr. GOSS:

Q. Mr. Parker, you had worked for the company for sometime before this time you got your leg bruised, had you? A. Yes, sire.

Q. How long?

A. I couldn't state exactly how long.

Q. At what were you employed at the time you got your leg hurt?

A. Mill wright.

Q. What? A. Mill wright.

Q. Mill wright. What were you doing?

A. Why helping look after the mill and mill wright, and general mill wright.

(Testimony of John A. Parker.)

Court: What work were you engaged in at the time you got your leg hurt?

A. Mill Wrighting.

Court: I know, but what particular work?

A. That is what they call it, mill wrighting.

Court: Mill wrighting I understand embraces the construction of the mill—from the time of its construction.

A. I was helpint.

Court: What doing?

A. I was breaking in new men on log deck. Learning new men occupation on log deck.

Q. Of what did your injury consist?

Mr. SMITH: Objected to as wholly immaterial under the issues in this case; I don't think it necessary to go into that case; that was settled, whatever it was.

COURT: They deny the injury to his arm was the basis of settlement, don't they?

Mr. SMITH: That was in the injury, and the result of it, the whole thing was involved in the settlement. They claim the whole thing was settled, for this release of \$400.00 we say there was an additional consideration for the release, so the question of the extent of the injuries, or how it happened, is hardly material in this case, except the fact that he was hurt.

Mr. GOSS: Our contention is, if there was no liability on the part of the company in this claim of settlement, that there was no consideration for it whatever, but it was voluntary, whatever we gave

(Testimony of John A. Parker.)

him, and on direct examination they went into the question of what happened to him at that time.

COURT: I think you have a right to examine him. Of course if there was a dispute and controversy between them, and the controversy was settled, that is all that is necessary to go in this cause of action.

Mr. Goss: This is to show what controversy there was, if any.

COURT: All right, go ahead.

Q. What did your injury consist of? What happened to you?

A. Why, while breaking this man in, there was a log came up on the—well, they call it a trough, and when it got to the trough or deck, it was split; when the tree fell, it split, and this piece was the side of the log, and we are in the habit, when a split on the log comes that way, we generally shove the piece back into the pond again, and doing so, we put a bar in between the piece split and the main log, and try to pry out. He stood on one side of the log, and I on the other, and we shoved on it; just a narrow piece, about six inch piece at this time. This piece gave way, I fell downstairs, and scraped the leg on down the shin bone, clear to the hip.

Q. Scraped the side of the leg?

A. Yes. And the other work I worked at that afternoon, why the grease got in this hurt inside the leg, and that caused the abcess to form on the

(Testimony of John A. Parker.)

side of the leg, and the poison jumped from that leg, the doctors claim, to the hand.

Q. And your hand got sore afterwards, from something in your blood?

A. While I was laid up, the hand got sore.

Q. Now, you employed Dr. Horsfall to look after your hurt, your hand?

A. At the time, no, Dr. Dix was on the case at the time of the hand.

Q. How long did you doctor with Dix?

A. Well, between that time, about fifteen days altogether.

Q. And then you got dissatisfied and went to Horsfall?

A. Well, I couldn't get him. He wouldn't come and attend to me. He split the hand all up and still called it rheumatism, etc, and I couldn't get him, and had to go to another doctor.

Q. You got dissatisfied with him and got Horsfall?

A. I could't get the doctor, and had to get some other doctor.

Q. Certainly; I say you were dissatisfied, and went and got Horsfall. That is what I asked.

A. Yes sir.

Q. And from then on, Horsfall treated you, didn't he.

A. Yes sir.

Q. And he cut off your finger?

A. Yes sir.

Q. And then cut off some more of it?

A. Well, not all at once. He cut off the hand.

(Testimony of John A. Parker.)

Q. Well, he operated on you two or three times and finally cut off your hand?

A. Yes sir.

Q. During any of this time, did you go to the company with any complaint about the way you were treated, or did you go to the doctor of your own accord?

A. Well, I couldn't go anywhere. I was——

COURT: Well, what did you do? He asked you whether you went to the company about it, or did you go to the doctor of your own accord?

A. Well, I spoke to the foreman about it at the time, and the foreman of the mill, he came to see me, and I told him necessary to get another doctor.

Q. You wanted to, and you never took this up with any of the officers of the company, or sent any word to them about it.

A. I reported to the foreman, and he spoke to the superintendent at the time, Mr. Demangen.

Q. Did you speak to Demangen personally?

A. I had no chance to see Mr. Demangen.

Q. Whom did you speak to? A. Mr. Bain.

Q. And when did you first go to Mr. Mareen?

A. Why after I got so I could carry the arm around in a sling.

Q. You went to Mr. Mareen. Where was it?

A. Well, I think the first time I met him was down in the yard, the company's yard.

Q. Down in the company's yard, and what was said at the time?

(Testimony of John A. Parker.)

A. Well, we had different conversations in regard to the hand, and how I lost it, etc.

Q. How you were getting along, etc?

A. Yes, I guess so.

Q. Was anything said about a settlement?

A. Why, yes, he talked with me about it.

Q. What was said about a settlement then?

A. Well, he says,—we talked of different things, and he said we would have a talk in the office a little later on.

Q. Well, did he,—were any statements made by him as to what he was willing to do, or what the company would do?

A. Well, he didn't bring it up exactly what would do then at that time; just talked things over in general.

Q. What was said? Anything that was said. You talked it over. Give us a general idea what the talk was, and what it was about. That is all I want.

A. Well, it was in regard to how I got hurt, etc.

Q. How it occurred? A. Yes sir.

Q. What did you tell him then?

A. Well, I told him just as I tell you now, how the case started, how I got hurt, etc.

Q. Did you tell him that Dix had neglected your case? A. Yes sir.

Q. And what else was said? Anything about your going to work?

(Testimony of John A. Parker.)

A. Well, not exactly, the first time we talked, we didn't say anything about going to work. I had just got out of bed, so that I could just get down around the yard at that time.

Q. Anything about paying you anything, or anything about paying the doctor at that time?

A. Not at that time.

Q. Then all you remember was said at that time was that you told him how it was hurt, and that Dr. Dix hadn't properly taken care of you, Is that it?

A. That is about the sum and substance of that particular.

Q. And he said come to the office and talk it over?

A. Yes. I met him several times, different times, you know.

Q. Where did you meet him next time, if you remember?

A. When I would be down around the yard, would stop and talk, and walk around with him through the mill. We talked of different things like we would do until I got so I could go to work.

Q. When was anything first brought up about going back to work?

A. Well, he told me when I got ready, to be able to handle anything, they would put me to work to do something.

Q. Yes.

A. And named over different jobs I could do, said they could put a man with two hands on another job,

(Testimony of John A. Parker.)

and put me on it if necessary; said any job I could see I could do, he would be glad to put me at it.

Q. And what was said about the company paying the doctor, or anything of that kind, or paying money of any kind?

A. Well, went on odd days, and wanted to know what I would take to settle the case, and——

Q. He wanted to know. He brought that up? You didn't bring that up.

A. That is about the way it was brought up, yes.

Q. He asked you first what you wanted to settle it?

A. Just asked what kind of a settlement could come to.

Q. Didn't you first tell him you wanted some pay for it?

A. No, I don't know as I did.

Q. Well, what did you tell him you wanted?

A. I don't know as I told him I wanted anything. He just offered me what—just offered me so much money.

A. I don't know as I told him I wanted anything. He just offered me what—just offered me so much money, and what they could do.

Q. Was anything said about half time for the time you were laid off?

A. Yes. In the settlement that is what we settled on.

Q. That is what you settled on? About half time for the time you laid off? A. Yes.

Q. And did you ask for that, or did he propose that himself?

(Testimony of John A. Parker.)

A. He proposed it.

Q. You knew that was the way they generally settled with the men anyway, wasn't it?

A. Well, I never had any—I never had any idea to know what they did settle for. I never had any trouble with the company or never had anything to do with it one way or the other.

Q. Well, had you made inquiries or found out how they had settled with other people?

A. No, I never.

Q. Didn't you understand they usually gave a fellow half time when off?

A. No, I didn't know anything about it.

Q. Never heard that?

A. I have since that.

Q. When was it you first talked about it at the office?

A. Oh, somewheres in May, I think it was.

Q. Had you gone to work before that?

A. No.

Q. You hadn't gone to work before that?

A. Not when I first talked, no.

Q. What was said in the first conversation in the office?

A. Well, we talked over what he would do, and what he would give me, etc. He gave me time to think it over, and I rode down with him in the wagon to town, and different parties came, and urged me to settle with them and take what I could get.

Q. And what was said in these conversations about giving you a job, about keeping you employed?

(Testimony of John A. Parker.)

A. Well, I said before, he promised to give me employment as long as I wanted it.

Q. Said he would give you any work you could do?

A. Yes Sir.

Q. And he said that every time he talked with you, always said he would give you a job as long as you—any job you can do, as long as you want it?

A. Yes sir.

Q. And didn't he say that right at the start, that the company always does that?

A. Why, he told me that they had men in their employ for years, and always kept them employed, and he said, "You will always have a job, as long as the company is a company; that is would always have employment."

Q. And that was said before you had agreed on any money payment or on any half time, or on any pay for the doctor, wasn't it?

A. He said that all the time.

Q. Yes.

A. He said he would keep me employed.

Q. And you did go to work, didn't you, for the company, as soon as you were able?

A. Yes sir.

Q. When was that?

A. Well, somewhere I think probably, April or May somewhere.

Q. What work was it you were put at?

A. I was helping pull levers in the trimmer box.

Q. And then what did you do next?

(Testimony of John A. Parker.)

A. Well, I got appendicitis, took appendicitis while I was working there.

Q. How long did you work as extra man and trimmer?

A. Well, somewhere around something over a month.

Q. What wages did you get doing that?

A. Why, if I remember right, I think it was \$2.50.

Q. And then you say you had appendicitis?

A. Yes sir.

Q. And when was it you made this last settlement with the company? After that? A. Yes sir.

Q. How long were you gone with appendicitis?

A. I guess probably three months.

Q. Three months. And then when you came back to work, did you see Mr. Mareen, or anyone before you went to work again.?

A. Yes sir.

Q. Was that the time you made the final settlement?

A. I think it was.

Q. You think it was. Did you see him after you had the appendicitis; that is, after you laid off this time, and before you made the final settlement, as we call it?

A. Did I see him before that?

Q. Yes.

A. Yes, I see him when I made the settlement, before I went to work later on. I saw him when I made the settlement, of course.

(Testimony of John A. Parker.)

Q. I mean after you had appendicitis, and before you made the settlement, did you see him and have other talks with him, or was that the first one you had?

A. When I settled with him.

Q. Yes. A. Yes.

Q. Then from the time you quit with appendicitis, until you made this settlement, you had no conversations or other conferences with him, with regard to settlement, or anything?

A. Oh, I guess probably we had different conversations.

Q. When was the question of the doctor bill first brought up?

A. Well, that was before I had appendicitis.

Q. Before you had appendicitis. Did you show him the amount of the bill?

A. Yes, I gave him the bill.

Q. What did he say about it?

A. Well, I told him first what it would be.

Q. Yes.

A. I went to Mr. Horsfall, and I asked, I asked what the bill would be. Well, he says, "Jack, you have had such a hard time of it etc., just make it in round numbers \$175." So later I went and saw Mr. Mareen and told him what the bill was and Horsfall made bill out for \$210. Then Mr. Mareen wanted a statement of the trips he made to see me, etc., and when Dr. Horsfall made his bill up, it was all together \$210, and I took this bill and gave it to Mr. Mareen, and he said he wouldn't pay it, said that he—the bill

(Testimony of John A. Parker.)

was \$175., and that is all he would pay. So I went and seen Dr. Horsfall again, and told him that Mr. Mareen said he wouldn't pay that bill of \$210., that the bill was given in the first place \$175., and I says, "You take this \$175, Doc.," I says, "I think you have treated me on the square," I says, "When I get able, I will pay it." So he said, "Well, just pay that \$175." he says, "if the company is small enough to jew a man down to \$175. why, I will take that."

Q. And that was in September, wasn't it, when you made the settlement?

A. I think that bill was paid before that. I gave the check to the doctor right over. I don't know when the date.

Q. Well, is this the bill that the doctor rendered, do you know, the one he gave the company?

A. Probably it is. I don't remember it very well.

Q. Then these negotiations with the doctor about the amount of the bill was before you had the appendicitis?

A. Yes, I think so.

Q. And he had agreed to take \$175. before you had the appendicitis?

A. Yes, sir.

Q. And then after that you came back, When was the doctor paid? At the time you signed the written settlement?

A. No, he was paid before that.

Q. He was paid before that. Well, is that the statement you signed at the time you had the final settlement?

(Testimony of John A. Parker.)

A. Yes, I guess it is.

MR. GOSS: I will offer that in evidence. (To Mr. Smith) This is the one I submitted to you.

Marked "Defendant's Exhibit A".

Q. Now, you don't think you had any conversation between the time you came back, got over appendicitis, and the time you made this written settlement?

A. Yes, sir.

Q. Oh, you did have some?

A. After this written settlement?

Q. No, before the settlement was finally made.

A. Well, at the time I had that settlement, he told me then that—I asked him why he didn't put that in writing, and he says these blanks are already made out, etc., He says will be no trouble about any settlement we have.

Q. Now, that isn't what I asked you at all, is it? I asked you if you had any other conversations with him between the time of that settlement—between the time you were taken sick and the time you signed this paper?

A. We had several, I told you one time before.

Q. You had several. Did you have one the day before you signed this?

A. Well, I couldn't remember just when, but several that day before this paper was signed.

Q. Just a few days before?

COURT: After you had appendicitis, and before the paper was signed, did you have any conversation with the superintendent about this settlement of the

(Testimony of John A. Parker.)

matter? After you had appendicitis, and before this paper was signed?

A. Yes, we had several talks.

COURT: That is what he is asking you about.

Q. Where were they? In the office?

A. Well, once in the office; once or twice in the office, and once down around the yard.

Q. And was the settlement entirely agreed upon before you had the meeting in the office, at which this paper was signed?

A. Yes, sir.

Q. It was all agreed upon before that?

A. Yes, sir.

Q. How long before?

A. I think it was about one or two days before we—

Q. One or two days before. And at the time—at the time you met him there in the office, did you have any extended conversation, or was it all agreed upon beforehand, and you just went in and closed up?

A. Oh, we talked a little while after we got in.

Q. You talked a little while then. Did you talk after you signed this too? A. Yes, sir.

Q. And that is the time you asked him if he didn't think it was Dr. Dix's fault, and he said yes?

A. Yes, sir.

Q. At the time you signed this up, was there any one present except yourself and Mr. Mareen?

A. No, sir.

Q. Mr. Nelson stepped in and witnessed it?

A. Yes, sir.

(Testimony of John A. Parker.)

Q. After he asked you if you signed it? You signed it.

A. If I remember, I think—

Q. You read this over before you signed it, didn't you?

A. Which?

Q. This written statement I have just put in evidence?

A. Yes, sir.

Q. And it reads it is for \$410.75. How did you arrive at that amount?

A. What?

Q. How did you arrive at that amount, \$410.75?

A. He figured up the time I lost, split my wages in the middle.

Q. Called it half time?

A. Called it half time.

Q. And what did you add to that?

A. Didn't add anything to it.

Q. Didn't add anything to it. They paid the doctor \$175.

A. Yes, sir.

Q. They paid that too, did they?

A. They had paid that beforehand.

Q. Oh, they had paid that beforehand; and at this time, just what did Mr. Mareen say with regard to your work and having a job?

A. Ask the question again, please.

COURT: What did Mareen say at the time you signed that written agreement about your work?

(Testimony of John A. Parker.)

A. Well, at the time I signed the agreement, he promised to keep me employed.

COURT: What did he say? What language did he use?

A. He said there was many jobs I could have, and they could always find a place for me.

Q. Is that all he said?

A. Well, he talked along those lines. I couldn't remember just now what he said, word for word.

Q. What did he say about giving you a job?

A. Well, if I remember right, he said that he had spoken to the superintendent, and foreman of the mill, and they were going to look for different positions that I could do.

Q. What did he say about giving you a job as long as you wanted it, you say, or something of that kind?

A. He said he would always keep me employed, as long as I wanted.

Q. As long as you wanted it? A. Yes, sir.

Q. Did he tell you that before or after this was signed?

A. told me that different times.

Q. Told you that all along? A. Yes, sir.

Q. And you had been working before that for them too, until you got appendicitis? A. Yes, sir.

Q. And you understood that as soon as you got over the appendicitis you could go back to work, didn't you?

A. Yes, sir, hadn't settled with them at the time I got appendicitis.

(Testimony of John A. Parker.)

Q. You hadn't settled with them?

A. Hadn't settled. We had talked over, but we had never settled anything.

Q. Oh. When you got this final settlement, I am trying to get at just what was said when you signed these papers. That was the time you settled when you signed these papers?

A. That was the final settlement.

Q. He said then before you signed the papers, did he that the company would find a place for you, and you could work as long as you wanted to.

A. Yes, sir.

Q. He didn't say anything about any conditions about your work?

Q. No, sir.

A. He didn't say—did he say if you settled the case he could do that?

A. That was the understanding, yes.

Q. Well, but did he say if you settled the case and took this money they would do that, or did he say that anyway?

A. Yes, sir.

Q. Did he say if you didn't settle the case, he wouldn't have you work for them?

A. Never mentioned anything like that at all.

Q. Never did. And then he said this, did he, before you signed the papers?

A. Yes, sir.

Q. Right at the meeting, at that time?

A. At different times he said that.

(Testimony of John A. Parker.)

Q. I know at other times, but did he at that particular time?

A. Yes, sir, at that time.

Q. And after you had signed the papers, what did he say? Anything?

A. Said the same thing.

Q. Did you ask him what was to prevent the company from firing you as soon as you signed the papers?

A. No, I had talked about that before.

Q. What?

A. I talked with him about that before.

Q. What did he say about that?

A. He said no question about that. He said he had men in their employ that they kept employed right along, didn't make any difference whether crippled or not; so long as they were crippled they were in their employ.

Q. That the company would play fair, is that what he said?

A. No, he never used fair at all.

Q. Didn't he use that word? A. No, sir.

Q. Didn't he say the company always treated the men fairly?

A. Yes, sir.

Q. All right. That is the same word practically.

A. Well, yes, in a different light.

Q. And he told you they always treated the men that way, didn't he?

A. That is what Mr. Smith told me, yes.

(Testimony of John A. Parker.)

Q. That is what Mr. Mareen told you too, didn't he?

A. Yes, I guess he did.

Q. And you know that there are men, you know of men working there that had been hurt, and they kept them right along?

A. I don't know kept them there. I don't know of any men in their employ at that time that had been crippled. They told me about cases back east.

Q. And then after this settlement, you went to work, did you?

A. Yes, sir.

Q. You called his attention, you say, to the fact that that wasn't—about the job wasn't in the written form there at all?

A. I called his attention to it at the time, yes.

Q. What did he say about that?

A. Well, he says these here are made up in form like, and the company has this kept on record; "in regard to your being kept to work, that will be all right," he says, "You will always be kept employed."

Q. "You will always be kept employed," and after that you went to work, did you, right away?

A. Yes, sir.

Q. That is, the next Monday morning you went to work?

A. Probably.

Q. And what were you put at? What work?

A. In the trimmer box helping pull levers.

(Testimony of John A. Parker.)

Q. Helping pull levers in the trimmer box, how long did you work there?

A. I worked there about—now you are talking about—that is before the settlement?

COURT: After you signed this agreement.

A. Oh, well, I went over to Bay City then.

Q. Yes.

A. As foreman of the yard around different places.

Q. Foreman in the yard?

A. Taking machinery out of Bay City, etc.

Q. They were taking down the Bay City Mill there, were they?

A. Yes.

Q. And you had a crew of men; eight or ten men were tearing down the mill?

A. Taking machinery out, yes.

Q. And then how long did you work at that?

A. Well, as long as until they got the machinery all right, and then the construction foreman, he came over and he took charge.

Q. That is Stack? A. Yes, sir.

Q. Then what did you do?

A. Went on as time keeper and kind of straw boss under him.

Q. Then when that mill was completed, what did you do?

A. Went in the trimmer box.

Q. And you stayed there until when?

A. Stayed there until I got canned.

COURT: I didn't understand that.

(Testimony of John A. Parker.)

A. I stayed there until I got laid off.

COURT: You said this morning you quit and went over to attend to some other business, and when you came back you were discharged.

A. I was always on the job, but I asked for a lay-off to go over and come back.

COURT: That is what I wanted. You gave the impression you worked up continually until the time you were discharged.

A. No, I asked the foreman for a lay-off, and he said they had a man they could put in my place until I came back. When I came back, why, they said they had no job for me.

Q. That was when you were laid off, on this lawsuit, as administrator of your brother?

A. Yes, sir.

Q. Now, before you did that, you say you asked the foreman for that, but didn't you have a conversation with Mr. Mareen before that about laying off, and about bringing this suit for your brother?

A. About bringing the suit?

Q. Yes, as your brother's administrator.

A. Yes, I had a talk with him.

Q. What?

A. Yes, sir.

Q. That is before you laid off? Before you brought the suit?

A. Yes, sir.

Q. And what did Mr. Mareen tell you about it then?

(Testimony of John A. Parker.)

A. He told me he didn't want me to bring that suit.

Q. Yes, but what did he say about—you said something about your job then, didn't you, too?

A. He sent for me to come over and see him.

Q. Yes. That isn't an answer to my question. But didn't he say something about your job?

A. I don't remember.

Q. Didn't he tell you that you are liable to lose your job if you bring that suit?

A. No, sir.

Q. He didn't. Didn't any one tell you that?

A. No, I don't know as they did.

Q. You don't know that they did. Weren't you given to understand that if you brought that suit, you would lose your job?

A. What?

Q. Weren't you given to understand that if you brought that suit, you would lose your job?

A. Well, kind of hinted. Some of them hinted that at different times.

Q. Yes. A. But—

Q. But when Mr. Mareen sent for you this time, and had this talk with you, he didn't say anything about that?

A. No, I don't know as he told me he would lay me off on account of that suit or not. I don't believe he did.

Q. You don't believe he did? A. No.

(Testimony of John A. Parker.)

Q. You don't know whether he did or not.

A. I don't believe.

Q. Do you know he didn't?

A. I know he didn't.

Q. You know he didn't.

A. Tell me he would lay me off on account of bringing that suit

Q. Did he say he would lay you off on any account?

A. No, sir.

Q. He just asked you not to bring it?

A. Yes, sir.

Q. That was all. And, now before that time, didn't you quit once?

A. I took a lay-off.

Q. You took a lay-off. Didn't you turn in your time and quit?

A. I did not.

Q. In September? A. No, sir.

Q. You didn't? A. No, sir.

Q. And didn't you quit and strike for higher pay?

A. I asked for more money, I didn't quit.

Q. You didn't quit? A. No, sir.

Q. How long did you lay off?

A. About a week.

Q. About a week. Did you ask for a lay-off?

A. Yes, I told him I was going to take a lay-off.

Q. Didn't you tell him you would quit?

A. No, sir.

Q. And didn't you turn in your time, and get your pay?

(Testimony of John A. Parker.)

A. No, sir.

Q. You didn't? A. No, sir.

Q. And when you came back to work that time in September, what did you say about your job? Whom did you ask for a job again?

A. When was that? After the trial?

Q. No, no, in September, when you quit before this.

A. I just went back and went to work, that is all.

Q. Just went back and went to work again at your job? A man had your job?

A. He had my job, but he didn't hold the job. I went back to work.

Q. He didn't hold it when you went back? Did you have any conference with him about it.

A. With him?

Q. Yes, about this job? A. Yes.

Q. What did you tell him?

A. Oh, told him I was going to try and get some more money. Was promised \$3.50 a day and I was going to see if I couldn't get it.

Q. Who promised you \$3.50 a day?

A. Mr. Mareen told me he would give me the going wages at the time.

Q. That job you were working at as trimmer in the East Side Mill was \$3.00?

A. \$3.50 was the going wages at that time.

Q. Didn't that particular job pay that?

A. No one getting \$3.00. All getting \$3.50

Q. Didn't the man working there ever since get \$3.00?

(Testimony of John A. Parker.)

A. Yes, but they held them at my rate of wages, held the men down.

Q. Held the men down to the same wages they paid you? A. Yes, sir.

Q. Does any trimmer man in that East Side Mill get \$3.50 a day?

A. Only one trimmer there.

Q. That is a short log mill?

A. Well, I tell you, Mr. Goss, when I took that job at \$3.00 a day, they were cutting 35,000. After they got to running a month or so, they promised me \$3.50 a day, the same wages in the other mill. He says, "Yes, when you get to 125,000, we will be able to pay you that money, and not until." When the time comes, we got 125,000, I went to him about it, and he says, "spruce is away down, the price is away down on spruce, and I can't see it." That was talk we had.

Q. That is a spruce mill.

A. Was at that time.

Q. Well, they cut spruce, cedar and white fir at that time.

A. And I never did get over \$3.00 a day.

Q. That is short log mill, isn't it?

A. Yes, sir.

Q. And that is all they ever paid in that mill you know of? The trimmer men over in the big yellow fir mill get \$3.50?

A. Yes, sir.

Q. Now, you say at that time you took a lay-off in September, you just took a lay-off?

(Testimony of John A. Parker.)

A. Yes, sir.

Q. You claimed you were going to quit?

A. No, sir.

Q. You didn't tell them you had quit?

A. No.

Q. Didn't tell anybody you had quit?

A. No, I don't believe I did.

Q. And when you went back to work you didn't have to go and see the foreman about getting in again?

A. I told them I was coming back to work again.

Q. Did you go and see Murch? A. No.

Q. Didn't see Murch at all?

A. I met Murch a couple of times, and he said, "Jack, when are you going back to work?"

Q. During that week you went off?

A. No, I went up to the ranch, my father-in-law's ranch. He said "You better go back and go to work. Take a couple of days more and go to work."

Q. Why did he tell you to go back and go to work?

A. They needed me.

Q. Then Murch wasn't the man who put you back to work. Rourke was the foreman.

A. He was superintendent, and he could can me any time he wanted to.

Q. Rourke was foreman in that mill?

A. Mr. Rourke, yes.

Q. When you quit that time in September, you simply told him you were taking a lay-off?

A. Yes, sir.

Q. Didn't tell him you quit?

(Testimony of John A. Parker.)

A. Well, I told—

Q. Didn't you tell them you would have to have \$3.50 a day or you would quit?

A. No, I don't believe I did.

Q. And didn't you turn in your time to the foreman?

A. No, sir, I didn't.

Q. And didn't you tell the other men around there that you had got that fixed, and they would have to pay you back wages?

A. No, sir.

Q. When you quit the company, or took your lay-off, I mean, when you tried the lawsuit, you just took a lay-off then, did you? A. Yes, sir.

Q. For how long?

A. Well, I told him I was going to the trial, and didn't know how long it would be before I was back.

Q. Told them what?

A. Told them I was going over to that case at my brother's. I had to go. I was administrator of the estate. "That will be all right," he says, "get a man to take your place until you come back."

Q. That was Rourke, was it? A. Yes, sir.

Q. When you came back they wouldn't give you, the place?

A. Mr. Murch told Rourke when I got back to tell me they had a man in my place.

Q. But you didn't hear that until you got back.?

A. What?

Q. You didn't hear that until you got back to work.

(Testimony of John A. Parker.)

A. I didn't know anything about it.

Q. Not until you got back to work?

A. Not until I got back to work.

Q. And then, what did you do then?

A. When I got back?

Q. Yes.

A. I went to work in the trimmer box.

Q. You couldn't go to work, They said they had a man in your place.

A. Oh, you mean that time?

Q. This last time, yes.

A. Yes, I went home.

Q. Who did you see of the company about it? Anybody?

A. Why, no, I don't believe I did at that time.

Q. Did you go to see Mr. Mareen?

A. No, I didn't go to see Mr. Mareen. I asked Mr. Rourke whose orders it was. He said it was Mr. Murch's and I had been familiar with the company enough to know that when orders came that way, they came from Mr. Mareen.

Q. You didn't tell Mr. Rourke or Mr. Murch or any of them that they had agreed to give you a job and keep you there right along as long as you wanted it, did you?

A. I don't believe I did.

Q. And when did you go to Mr. Mareen about it, or to any one?

A. Well, I waited until Mr. Smith came.

Q. How long was that?

(Testimony of John A. Parker.)

A. Oh, I don't know; probably a month.

Q. Probably a month?

A. I don't know exactly.

Q. And then did you go to Mr. Smith?

A. Yes, sir.

Q. Mr. C. A. Smith? A. Yes, sir.

Q. President of the company. What did he say?

A. He told me that I brought a case against the Smith Company for my brother's death, and it was up to Mr. Mareen; whatever he said, went.

Q. Did you tell Mr. Smith that they had agreed to keep you as long as you wanted to work?

A. He knew that; he understood that.

Q. How did he understand it? Did you ever talk to him about it?

A. Yes, he told me that himself. He would always see I was employed.

Q. When did he tell you that?

A. He told me that at the time I was carrying my arm around in a sling.

Q. That was before you made the settlement with Mr. Mareen?

A. Yes, sir.

Q. He said he would always see you were employed?

A. Yes, sir.

Q. And you always had that statement of his in mind, did you?

A. Yes, sir.

(Testimony of John A. Parker.)

Q. And what did he tell you then this time when you reminded him of that, or didn't you remind him of that statement?

A. I don't know as I did. I believe I did bring it up.

Q. What did he say about it?

A. Well, he said that as far as he was concerned, he says, "You can go back any time. You see Mr. Mareen and talk to him about it." We talked a long time on different subjects, etc., and that is about all.

Q. He said as far as he was concerned, you could go back to work any time you wanted to?

A. Yes, sir.

Q. And you would have to see Mareen about it?

A. Yes.

Q. Did he admit that he promised you work any time you wanted it, as long as you wanted it?

A. Well, he didn't admit it right at that time, but it was understood that way.

Q. When and where was this conversation with Mr. Smith?

A. In his office.

Q. In his office, and when was it?

A. I don't know as his office, or whose office it was, but in the C. A. Smith building, I think probably his office.

Q. And when did you see Mr. Mareen about it?

A. Well, I went to see him before I brought this case, before I started it.

Q. Before you brought this case?

(Testimony of John A. Parker.)

A. Before I started it.

Q. How long was that after you had seen Mr. Smith?

A. Well, probably, I don't know, a week, a couple of weeks.

Q. Wasn't it about a month?

A. Might have been.

Q. Yes.

A. Oh, I know it was before I brought the suit.

Q. Before you started this suit. What did he say about it?

A. Said he couldn't keep me employed.

Q. Couldn't keep you employed. Did he say why?

A. Well, he brought the subject up, that I was always looking for trouble, etc., with the company, and I told him I just wasn't looking at trouble at all; just wanted justice.

Q. You had at one time started an agitation against Dr. Dix there hadn't you?

Mr. SMITH: That is wholly immaterial, if the Court please. If he wants to go into it, go ahead. We don't object.

A. You bet I did. At that time I had my hand taken off, the boys in the mill there all knew the circumstances from start to finish, and the filers in the mill at that time told me to get a petition up and take it around; they didn't want a man like that to butcher men up.

Q. Anything else at that time?

(Testimony of John A. Parker.)

A. Well, on the way downstairs, before I got the petition up, I spoke to Mr. Mareen about it, and Mr. Mareen told me, "Jack, don't start anything like that now. When Mr. Smith gets here", he says, "we will make a change." And taking him at his word, they never made the change. The change is not made yet.

Q. Anything else?

A. I don't know of.

Q. Did you go back to Mr. Mareen again after this conversation you had some two months after you were told you couldn't have a place there, did you see him more than once about that?

A. I don't know as I did.

Q. Then you brought the suit. Now, what did you do in the way of work after this time?

A. Well, after I got laid off, I started writing insurance, and first, while out in business, why, I did pretty well. I came to Portland on a case for a young fellow that had his foot taken off, and when I went back the C. A. Smith Company or their superintendent ordered me off the works. Told me I couldn't be on their plant any longer; and I came up here as a millwright, and when I went back, why I was ordered off the works, where I could write insurance. I wasn't allowed at all.

Q. Who was it ordered you off?

A. Mr. Murch.

Q. That is, he ordered you off the place in business hours?

A. He told me to stay off the plant entirely.

Testimony of John A. Parker.)

Q. And then what did you do?

A. Well, I seen then that nothing to do but get away from around there altogether. At such things a man couldn't make a living around here, so I went to where I am living now in Florence.

Q. In Florence, and bought out a pool hall, didn't you?

A. No, sir.

Q. Haven't you a pool hall there now?

A. My wife has a confectionery store there and two tables in it.

Q. Oh, your wife bought it. That is what you have been running?

A. My wife is running that, yes.

Q. You run it, don't you?

A. I run it?

Q. Yes.

A. Well, I am working around there, yes.

REDIRECT EXAMINATION.

Questions by Mr. Smith:

Just a moment, we will clear that case up you were up here on. You say that is a case where a fellow got his foot taken off. Was that also a case against this same company?

A. Yes, sir.

Q. You were a witness there, were you?

A. Yes, sir.

(Testimony of John A. Parker.)

Q. And it was after that that Mr. Murch told you you should not come on their premises any more down there?

A. Yes, sir.

Q. What had you been doing about their premises there?

A. Why these fellows I am all acquainted with, and I can always do business with those fellows I am acquainted with better than I can strangers. They all knew my condition, etc., and I could always write insurance policies on these parties.

Q. All you were doing was writing insurance for the men, was it?

A. Yes, sir.

Q. They have asked you about a number of conversations I didn't ask you about in direct. Do you remember a conversation between your mother and Mr. Mareen?

A. Yes, sir.

Q. Were you present?

A. Yes, sir.

Q. State what Mr. Mareen said or state what the conversation was between those two? Between yourself and Mr. Mareen in your mother's presence, is the way it was.

A. Well, I asked Mr. Mareen if he didn't remember the promise to keep me employed, and he said he did.

Q. When was this conversation between you and Mr. Mareen in your mother's presence?

A. That was just before I brought this case.

(Testimony of John A. Parker.)

Q. Now, another question. After you brought the case about your brother's death, and before that case was tried, did you go ahead working for the company?

A. Yes, sir.

RECROSS EXAMINATION.

Q. You say you were present when Mr. Mareen and your mother were talking?

A. Why, my mother was present when Mr. Mareen and I were talking.

Q. Oh, that is it. And that was another time that you went there after you had been refused work, and before you brought the suit?

A. Well, I talked with Mr. Mareen on the phone before that, and that was the last time that I was talking with him was when my mother was present.

Q. What did Mr. Mareen say at that time?

A. Well, we talked the whole thing over and just about the same thing as we had been talking about.

Q. What did he say about having agreed to give you a job, as long as you wanted it?

A. Well, he admitted that he had promised to give me a job as long as I wanted it.

Q. He admitted he had promised that but said he wouldn't do it.

A. Well, he said he couldn't under the conditions, etc.

Q. Isn't that the only time you came to him after you had gone back and been refused a job? Isn't that conversation the only one you had?

(Testimony of John A. Parker.)

A. No, it ain't the only one, no.

Q. When was the other—before that?

A. I talked to him on the phone.

Q. You talked to him over the phone?

A. Yes, sir.

Q. Wasn't that the only time you went and talked to him personally?

A. I couldn't say.

Q. You couldn't say?

A. Probably it was.

Q. And what was the conversation over the phone?

A. I asked him if he would put me back to work. Well, I asked him if I couldn't make an appointment with him. He said, "What do you want to talk about?" I told him. Well, he said, "Come over some time," and he said, "We will have a talk."

Q. Now, how long after the first time you were hurt was it? That is, when you got your leg bruised before you went back to work? You worked the rest of that day, didn't you?

A. Why, I think probably, now, I worked the rest of the day, yes.

Q. Then how long after that did you go back to work?

A. I went back to work, I think it was Christmas or the day afterwards.

Q. Didn't you go to work just a few days afterwards again?

A. No.

Q. And work for three or four days?

(Testimony of John A. Parker.)

A. No. Well, just a short time after, I did too. I went back with the hand all tied up and helped. They were busy about some work, and they had got no man they could put in to take the place, and I went down with my hand in a sling tied up, I think.

REDIRECT EXAMINATION.

Q. Is your mother here in this country?

A. No, sir.

Q. Where is she?

A. Amherst, Nova Scotia.

Q. Amherst, Nova Scotia, Canada—is that the place?

A. Yes, sir.

Witness excused.

Mr. SMITH: I will offer in evidence the deposition of Katherine B. Parker, taken by stipulation signed by Mr. Goss and Mr. Stoll.

Mr. GOSS: The only objection we have, we want it understood at this time that the witness is not here.

Deposition of Katherine B. Parker read in evidence and marked "Plaintiff's Exhibit 1".

JOHN E. PARKER. RECALLED FOR FURTHER
CROSS EXAMINATION.

Questions by Mr. GOSS:

This deposition of Mrs. Parker that has just been read was taken down there at Marshfield, in a case—that is before this case was started here, wasn't it?

A. I couldn't state, I couldn't state the date that was taken.

(Testimony of John A. Parker.)

Q. It was taken in a case, exactly the same case, but you started it in the courts down there in Coos County, wasn't it?

A. I couldn't state anything about that.

Mr. SMITH: We will admit that; that that case was dismissed, and this one was started.

Mr. GOSS: That is all good enough.

Q. Did you testify you were up here on another case? Up here in the case of West vs. The Smith Lumber & Manufacturing Company?

A. Sir?

Q. You have mentioned testifying in another case up here. That was the case of West vs. The Smith Lumber & Manufacturing Company, was it?

A. Yes, I was up here on that case.

Q. In that case didn't you testify as to what you were doing?

A. I think I testified that I was an insurance agent.

Q. And didn't you testify in that case that you were doing well at that occupation?

A. I don't remember of stating anything about it.

Q. As a matter of fact, at that time, you were doing well in that?

A. I did a pretty good business the first three or four or five months I went in the business.

Mr. SMITH: And that was before they had forbidden you to keep away, forbidden you to come on their plant?

A. Yes, sir.

Witness excused.

(John F. Bain.)

JOHN F. BAIN

A witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. STOLL:

State your name?

A. John F. Bain.

Q. Where do you live?

A. Living in Bandon, Oregon, Coos County.

Q. Do you know the plaintiff in this case, Mr. Parker?

A. I am acquainted with the gentleman.

Q. Know Mr. Mareen?

A. Also acquainted with Mr. Mareen.

Q. You may state to the jury what position you occupied in the employ of the defendant at the time that Parker was hurt.

A. I was filling the position in the mill as foreman, mill foreman and head millwright.

Q. Which Mill?

A. The only mill they had in operation at that time. What is now known as the large mill, Marshfield, the only mill they had in Marshfield.

Q. What was Parker engaged in at that time, that is, before he was injured?

A. Parker, at the time he was injured?

Q. Yes, and before.

A. At the time and before Parker was injured, he

(Testimony of John F. Bain.)

had been employed by the company working under my directions as millwright; in other words, we called it a chaser on the upper floor, a trouble finder.

Q. Now, after he was injured, I will ask you to state whether you had a conversation with Mr. Mareen, with reference to effecting a settlement with him, and if you had such conversation, state what it was and where it occurred.

A. I did have a conversation with Mr. Mareen in reference to the settlement with Parker.

Q. Just state the conversation.

Mr. GOSS: You were the mill foreman, were you?

A. I was.

COURT: Yes, he was mill foreman. Go ahead.

Q. What was your question?

COURT: State when and what it was. You said you had a conversation with Mareen about settlement.

A. Yes, about the time that Mr. Parker would be able to go to work after the accident that he had had, Mr. Mareen spoke to me one evening in regard to it. Asked me what I thought about Parker going to work again. I told him I thought it was a pretty good idea, and I also told him that I thought the sooner we got Jack to work the better it would be for all of us. I claimed us as I claim myself one of you when I am working for them.

Mr. GOSS: I object, unless they fix the time, as incompetent, irrelevant and immaterial. He went to work. That, as I understand is when he first went back to work after he was hurt.

(Testimony of John F. Bain.)

A. After his accident.

Mr. GOSS: I don't see what this conversation would have anything to do with the settlement, as it occurred long after that.

COURT: Not unless connected up.

Mr. SMITH: I will connect it up. It will be connected up presently.

A. I talked the matter over for a few minutes. He finally advised me to see Mr. Parker, get him back to work which I did. I called upon Mr. Parker that evening on my way home, and asked him how he felt in regard to going to work. He said he thought he would be able to go to work, but he believed he ought to have something out of that. I finally told that I thought the company would do the very best thing with him, and advised him to go to work, and didn't tell him,—did not tell him that Mr. Mareen or any other of the company, had mentioned me in regard to it. He finally thought the best thing he could do was to go to work, and they would probably see that he came out all right. Another day or two later, I couldn't say whether the next day or not—very shortly after—Mr. Mruch spoke to me in regard to Parker going to work. And I told him I thought Jack would be on the job in a few days. I thought he was feeling as though he was going to work, and he also was very anxious that Jack should go to work, impressing on my mind that he thought it was a better thing to get him to work, take the other things off his mind, especially being crippled.

(Testimony of John F. Bain.)

Q. What did Mr. Mareen say about getting a settlement with him? What did he inquire of you in reference to giving—

Mr. GOSS: I object to this as incompetent, irrelevant and immaterial, as having occurred before any settlement took place, and not a part of any settlement, or part of any transaction.

COURT: They will have to connect that settlement; plaintiff will have to connect with the settlement itself. It probably leads up to that.

A. Mr. Mareen told me another day or two later, than when Mr. Murch talked to me that he had talked to Jack, and Jack would be back to work in a few days, possibly Monday morning. It was the middle of the week or later, when he spoke to me, and I of course, being interested in the case, asked whether or not he had made a settlement. He said to me that he had agreed with Jack for a settlement. He also told me that he had agreed to pay Jack's doctor bill, give him some money, put him to work, and that I was to find Jack something to do that he could do. Asked me at different times what there was in the mill I could put him at. I explained three different positions that I thought we could use Jack at to very good advantage, and then we talked the matter over again.

Q. What was said about the length of time that this job was to last?

A. Talking the matter over again, he told me that we were to put Jack to work, and that he was to keep him working. He had promised him a job, and I

(Testimony of John F. Bain.)

asked how long, how I could figure, whether we was to keep a job for Jack open at all times, or whether he was to draw a salary; didn't state it possibly in those words, but my intention was to find whether he was drawing salary whether working or not. He impressed on my mind in so many words that Jack was to have a job with him as long as Jack wanted to work. Finally on—I think at any rate the first day of June, either first or second day of June, 1907, Jack went to work under my instructions, came back and applied for work. I put him in the trimmer cage as a helper, with one of the trimmers; explained to him at the time that undoubtedly when we put air on the machines, that he would be able to handle one alone, and that he would not miss the loss of his hand very much in that job, after it was arranged for him.

Q. What was done with reference to fixing a machine for him?

A. There was one—

Q. So that he could work?

A. There was nothing particular done to the machines in the big mill.

Q. Was there at the other mill?

A. The other mill was under construction at that time. I knew nothing of it.

A. I understood you to say that the conversation which you have detailed now, as with Mr. Mareen after he had effected the settlement.

A. As far as I know, it was after the settlement; only in—

(Testimony of John F. Bain.)

Q. Did you ever have any other conversation with Mr. Mareen, or with Murch with reference to the fact that Parker had been given a job as long as he wanted it? Did you have such a conversation?

A. I did.

Q. Go ahead and state it.

A. Either Mr. Murch or Mr. Mareen at different times asked me afterwards how Jack was getting along after he had gone to work. I told them that he was getting along fine; as far as I could see, he was doing well, and that we would be able to use him almost anywhere around the mill that a man could get along with one hand. We could use him as a trimmer man on the air machines. We could use him as a sawyer, make a sawyer of him; that he could have an arrangement on his hand that he could use a log turner with; thought it was a very good idea.

Q. Did Mr. Mareen tell you more than once about the settlement?

A. Mr. Mareen spoke to me but once. Mr. Mareen himself spoke to me but once in regard to the settlement.

Q. What did he state about being pleased with the settlement, if anything, that he had made?

A. He impressed me very much that he was greatly pleased with the settlement after Jack had gone to work.

Q. Did you ever have any talk with Murch about the terms of the contract?

A. I had some talk with Mr. Murch.

Testimony of (John F. Bain.)

Mr. GOSS: May it please the Court, I object to the conversation.

COURT: No evidence Murch knew anything about the contract. He didn't make it. If he knew it, it was hearsay.

Q. You said there about that conversation in June of 1907 or 1909. Now, which was it?

A. I believe I said 1907.

Q. 1907?

A. I think it was, but I am mistaken there undoubtedly.

Q. After he had gotten hurt?

A. Yes, I am not positive of that year, but still I would think—

Mr. GOSS: I move to strike out from the testimony of this witness all the conversation with Mr. Murch, or with any one other than Mr. Mareen or the plaintiff, as not responsive to the question, and as incompetent, irrelevant and immaterial.

COURT: I don't remember that he testified to any conversation with Murch about this settlement, but if he did, it isn't competent, and ought not to have been testified, because Murch did not make the settlement.

CROSS EXAMINATION.

Questions by Mr. GOSS:

Now, Mr. Bain, when was it you went into the employ of the Smith Company there?

A. I am quite sure it was in December, 1906.

(Testimony of (John F. Bain.)

Q. And how long did you remain in their employ?

A. I remained in their employment for about four months.

Q. About four months?

A. Yes, at one time.

Q. And then when did you go in again, if at all?

A. I left the company and returned in two weeks later.

Q. Then how long did you stay?

A. Something over 21 months, I think.

Q. All together. Now, this conversation that you had with Mr. Mareen was in June, was it?

A. I am quite sure it was in June.

Q. How do you fix it as being in June?

A. There was other things that occurred about that time of the year that brings to my mind, it was about June.

Q. And that was the only conversation you had—was at that time, was it, with Mr. Mareen?

A. Oh no.

Q. Well, when was the other one?

A. In regard to this particular case?

Q. Yes. That is what I mean, of course, in regard to this Parker case, of course.

A. Yes.

Q. That was the only one you had? You fix that as when Parker first went back to work, was it?

A. When he first went to work after his accident.

Q. Yes, that is what I am getting at. Before he had gone to work, Mr. Mareen spoke about it to you,

(Testimony of John F. Bain.)

or was it after he had gone to work?

A. Spoke to me before and after he had gone to work.

Q. Spoke to you first just before he went to work?

A. Yes, sir.

Q. Then how long after he went to work, when he spoke to you about it?

A. I can't state the exact length of time, but different times when he was around the work.

Q. Do you know when Parker had appendicitis? When he quit?

A. I think I remember distinctly when it was.

Q. That was after that, was it?

A. After his first accident.

Q. That was after he went to work this time?

A. Yes, sir.

Q. That is, he had appendicitis. Then he had to leave for quite a while on account of appendicitis, did he?

A. Yes.

Q. That was after this time that you speak of?

A. Yes.

Witness excused.

PLAINTIFF RESTS.

Mr. GOSS: I wish to move for a non suit, and a dismissal at this time, on the ground that plaintiff has failed to make out a case, in that, in the first instance, he has failed to show that there was any liability or any valid claim in law, as between the plaintiff and de-

(Testimony of A. Mareen.)

fendant company, upon which a settlement could be made, or as a basis of a settlement; that is, that the plaintiff has failed to show that he had any claim against the company whatever, and that this settlement or promise or agreement, or whatever it may be termed, was without consideration upon the part of the company and was voluntary. And for a second reason for non suit, I base it on the ground that the witness has failed to show that there was any agreement, distinct from the written agreement itself, distinct from the voluntary promises made at all times along through here, whereby he was to be continuously employed. And on the third ground, that it is shown by the plaintiff's own evidence, that he voluntarily ceased employment which would terminate any agreement that there might be.

COURT: It will be held in abeyance until the close of the testimony.

A. MAREEN

A witness called on behalf of the defendant, being first duly sworn testified as follows:

DIRECT EXAMINATION.

Questions by Mr. GOSS:

You are the Mr. Mareen that has been spoken of in the testimony here frequently before, are you?

A. Yes, sir.

Q. And you are the manager or superintendent of the C. A. Smith Lumber & Manufacturing Company, the defendant?

(Testimony of A. Mareen.)

A. Yes, sir, general superintendent.

Q. At the time of this occurrence, what office did you hold in the defendant company?

A. General superintendent.

Q. General superintendent. And you are, of course, acquainted with the plaintiff here, Mr. Parker?

A. Yes, sir.

Q. And are you familiar with the incidents that have been brought out here in the testimony at the time this occurred?

A. Yes, sir; quite familiar.

Q. After Mr. Parker was hurt, there, when did you first see him, if you remember?

A. I think it was shortly after he got up.

Q. And where was it, do you remember?

A. It was around the plant, the first time I saw him.

COURT: A little louder, please.

A. Around the plant, down at the plant.

Q. That is, not at the office, but down in the manufacturing part.

A. Not at the office.

Q. What was the subject of your conversation, if any, if you remember?

A. Why, it was in connection with his misfortune and in connection with his dissatisfaction. He brought up his dissatisfaction with Dr. Dix' treatment of the case at that time.

Q. Well, what was said by you at that time? Were any arrangements made, or anything said about—

A. No, not at that time.

(Testimony of A. Mareen.)

Q. Well, did you see him after that?

A. The next time I saw him, I think was at the office.

Q. And what was said at that time?

A. We talked over the case at that time, and he seemed to be more concerned about the way he had been used by Dr. Dix; he felt that the loss of his arm, or his hand, was due to the inefficiency of Dr. Dix, and his inattention during this treatment.

Q. What did you do, or represent to him you would do to settle with him?

A. I represented I would investigate the case, and see how it stodd. I didn't believe that—I thought he must be wrong in his supposition.

Q. Well, was there anything said at that time about his working?

A. Yes, I told him what our general policy was in employing men who were hurt from time to time at the plant; told him we always managed a place for them somewhere. The fact that he had lost his arm wouldn't deprive him of that general policy of ours; that we always give such men steady employment.

Q. And did you give him to understand that you would give him steady employment there in the plant?

A. I gave him to understand that we would do likewise with him, notwithstanding the fact he would only have one hand to work with.

Q. Was anything further said at that time about settlement?

(Testimony of A. Mareen.)

A. I told him I told him as soon as he was able to go to work, that we would give him such work as he could do; as soon as he felt able to be around the plant; and then he told me about his trouble, the doctor's bill, and all those bills coming on, and that he was a poor man, and didn't know what he was going to do about them, and wanted to know if we would—what about Dr. Horsfall's bill. I told him I would think that over, if he would find out how much it was, and then we would talk about that; that I had been away, I didn't know the circumstances of the case, and I wished to look into the matter thoroughly, before going any further or saying much about it.

Q. Then when did you have another conversation with him about it?

A. After—he came in, I think, a few days later than that, or was shortly after that, and told me what the doctor's bill was, the amount of it, and I asked him at that time, I inquired about the calls that he had made, etc., etc., how long he had attended him, and told him I would like to have an itemized bill of the doctor's calls, and what he charged. And he got that itemized bill, and brought it in shortly after that, and in going over that bill, I told him I thought the charge was excessive, that the doctor probably thought the company would pay it, and that he had made charges that weren't in keeping with his usual charges. I told him if he could get the bill reduced to practically half the price, that we would pay it.

Testimony of A. Mareen.)

Q. Well, what was done? What was said in any of these times about employing him, about his work?

A. Well, that was—I don't think there was anything said at that time. There might have been. That was all outlined in my first talk with him.

Q. And what about—go on and finish up what was done about the doctor's bill.

A. About the doctor's bill.?

Q. Yes.

A. Why, when we got the itemized bill, it was less than what his first figures were. He explained that, and I told him what we would pay. I think I told him \$175. If he would cut it to \$175. that we would give him a check for it, and just as soon as he would assure me—he would find out from the doctor, and just as soon as he would assure that the doctor would accept that amount, and give a receipt in full, that we would give him a check for that amount. The doctor accepted it, and we gave the check, and got the receipt in full for his bill.

Q. Now, what was done about that?

A. Which was that?

A. Well, we gave him the check for the bill, and got a receipt in full. With all of our men that are hurt that way, it was been our custom—

Mr. SMITH: That is objected to. That is not competent.

COURT: How much did you pay Horsfall—\$175?

A. \$175.

(Testimony of A. Mareen.)

Q. Did you make any statement to him as to what the custom of the company was, that is, to Parker, with regard to men that were hurt or laid off when injured?

A. Yes, I made—I told him our custom of paying the men half time while they were laid up in the case of accidents.

Q. And did you make any proposition to pay him that?

A. I told him we would do the same by him in that case, and he brought up an item of a drug bill that I think was included. We agreed to pay that.

Q. And how many conversations did you have before the final settlement, as we will call it, or when this paper was signed with him?

A. I couldn't say as to that. We had quite a few along from time to time.

Q. What did you represent to him in this conversation with regard to a job or work?

A. I told him what our custom was, and that we would—that the fact that he had lost his arm, wouldn't deprive him of the same in his case. That we would give him steady work and we would find some place that he could do, some work that he could do.

Q. What did you say to him, if anything, in regard to keeping him employed—how long he could work, or anything of that kind?

A. Just steady work is all I mentioned in that—under those conditions.

Q. Steady work. Now, coming to the time of this

(Testimony of A. Mareen.)

receipt here, do you remember when this was made out? This exhibit that we have in here, this paper here?

A. Yes, I remember that time.

Q. Was that made out the day it is dated, September 25th?

A. Why, I couldn't say as to that. Sometimes the—

Q. It was about that time?

A. It was about that time. These documents are made out after the agreement is made, then the first time a man comes in, it is signed up.

Q. Now, at that time—what conversation at the time that was signed, did you have with Mr. Parker?

A. I don't remember of any special conversation at that time, any more than in connection with signing it. We had it ready. It might have been signed the same day that I had the conversation with him; that is, I had the last conversation, the last talk with him in regard to it.

Q. What was said at that time about his employment, and about working for the company, his job?

A. I don't think there was anything said at that time.

Q. You had discussed that with him before, had you?

A. Had discussed that with him before.

Q. Now, what composed the terms that make up the amount of that statement that was put in there, if you remember?

(Testimony of A. Mareen.)

A. Why, it was the regular half pay. I don't know whether the drug bill was in this amount, or whether that was given—a separate check given for that. I think it was in this amount, included in this account.

Q. And the check was made to Mr. Parker then, was it?

A. What is that?

Q. Was the money paid to Mr. Parker there?

A. I presume it was when he signed this, by our secretary, Mr. Nelson.

Q. Now, Mr. Parker at that time was working for the company, was he?

A. I couldn't say whether he was or not at the time of this settlement.

Q. He had been before that.

A. Whether this settlement was after he came out from his operation.

Q. For appendicitis?

A. Yes, for appendicitis. I am under the impression that he wasn't at work at that time.

Q. That he had just come back from that operation?

A. Yes, I am under that impression.

Q. You knew he did go to work shortly after for the company?

A. Yes, sir.

Q. Did the company keep him employed after that?

(Testimony of A. Mareen.)

A. Yes, as far as I know, he was employed right along after that.

Q. When did you next see him?

A. I saw him about the work at various times.

Q. Converse with him about the work?

A. I was interested in his case, naturally. Had a great deal of sympathy for him, and was anxious for him to be taken care of in a way that he could perform his work under the condition he was in, and still, at the same time, turn out the work in keeping with what was necessary.

Q. At the time Mr. Parker signed that settlement agreement there, did he read it over? Did you read it over to him, do you know?

A. I don't think I read it over to him. I think I showed it to him. I think he read it over.

Q. Mr. Parker has testified to having spoken to you at that time, about there being nothing in there about his employment?

A. I don't remember of any such conversation.

Q. If there had been any such conversation, would you have remembered it?

Mr. SMITH: I object to that if the Court please, That is argumentative, and leading and suggestive, and this is his own witness.

COURT: State what occurred, and what was said, if he remembers.

Q. What was the question?

Mr. GOSS: The question has been ruled out.

(Testimony of A. Mareen.)

Q. Did you say anything to him at that time about his job? About his having that a part of his settlement there, a job, anything to that effect?

A. We might have talked about it, yes. We might have talked about it before this was signed. I don't think we ever had any conversation after it was signed. The matter was closed and thoroughly understood.

Q. After this was closed at that time, did he say anything about Dr. Dix, and whose fault it was that his hand was hurt?

A. No, that was discussed before that.

Q. Well, at any time did you admit it was Dr. Dix' fault his hand was hurt?

A. No, I told him I thought it wasn't Dr. Dix' fault, I thought he must be mistaken.

Q. Had you investigated the matter?

A. I had talked with Dr. Dix, and had it up with him, talked it over, got his ideas of the case, and his treatment of the case.

Mr. SMITH: It is hardly admissible, I think, his talk with Dr. Dix.

COURT: No, that isn't.

Mr. SMITH: I think we will object to that as incompetent. It wasn't in the presence of Mr. Parker, was it?

A. How is that?

Mr. SMITH: Mr. Parker wasn't present when you had it?

A. No. No.

(Testimony of A. Mareen.)

Q. Now, when did you next have a conversation with Mr. Parker about his work or about the matter?

A. That was at my first talk with him at the office that we talked.

Q. That was after he had quit and after the--

A. That was what?

Q. When was that? After he quit?

COURT: When was the next conversation you had with him after he signed this paper?

A. Oh, after he signed that paper. Well, I said around the plant at various times.

Q. But after that, I mean, with regard to his relations with the company, when did he—I will make it plain. When did Mr. Parker, if ever, make any claim to you that the company had agreed to give him a job as long as he wanted it?

A. I don't think he ever mentioned that to me only at the time that he and his mother were talking.

Q. That he and his mother were there?

A. Yes, sir.

Q. That was just before this suit was commenced?

A. Yes, sir.

Q. Now, at the time he and his mother were there, what was said in that conversation in that regard?

A. At that time?

Q. Yes.

A. He came over to see if I wouldn't employ him again, and the most of the conversation was along that line. I gave him the reason why I thought it wouldn't be best.

(Testimony of A. Mareen.)

Q. Well, tell us what was said as near as you can remember, by both of you.

A. I repeated—no, there was a meeting between that, the meeting that I had with him at the time I heard that he had sued the company for his brother's accident. I had a meeting with him at that time by appointment. I had him come over to the office in the evening. That was before this conversation.

Q. That was a meeting, then, between this time and the time he signed the papers?

A. Yes, sir.

Q. Then to state it in a chronological way, what was said at that meeting at the time you sent for him by appointment, at the time he brought the suit?

A. I asked him to drop the suit.

A. Yes.

A. I told him I didn't think the company in any way could be held liable for the accident, and asked him to drop the suit. I told him, says, I "You should know that we couldn't keep you in our employ if you are going to commence suit against us, and it will be the means of you losing your position with us, and it would be a shame under the circumstances." I told him—he said "You don't mean to say you will fire me if I don't drop the suit?" I told him not exactly that, but, says I, "It will be the means of your losing your position." And I appealed to him very strongly for him to drop the suit, and he said it wasn't his fault, that he was chosen administrator of his brother's affairs, and that it was just as much his family, that it

(Testimony of A. Mareen.)

was his family that had brought the suit. He couldn' help it, etc., etc.

Q. And what did you say about the suit? Anything further about it with him? Any conversation about the merits of the suit? Or why you asked him to drop it?

A. That is about all. We only had a short conversation about probably half an hour.

COURT: Talk louder. I don't believe the jurors can hear.

A. It was a short conversation in the evening after working hours, and that is practically all that was said.

Q. Then the next conversation you say, was the one when he and his mother were present?

A. With the exception of this telephone call over the phone where he called me, up and asked me if I had a position for him; that he would like to come over and make arrangements.

Q. And that conversation when his mother was present was subsequent to, and a result of that telephone conversation, was it?

A. Yes, sir.

Q. At that conversation what was said between you and him in regard to the promises of the company, or the consideration of the settlement?

A. He told me of his condition, and that he was unable to get employment. He had a home up there near the mill, and wouldn't be able to sell that and get out whole, and that he would like to go to work, like

(Testimony of A. Mareen.)

to have his position back. I told him I felt he shouldn't go to work for us the way he felt against the company. He felt the company wasn't doing right about it, right with him, and hadn't done right with him, and he had made lots of talk, and I felt it was better for him and better for the company if he would go to work for somebody else.

Q. Was that all that was said? You have heard the deposition of Mrs. Parker here with regard to your saying that you had—the company had promised him work, etc?

A. Yes.

Q. What have you to say in regard to that?

A. He repeated that.

Q. What?

A. He repeated that, and said the company had promised him steady work, and he didn't understand why he wasn't entitled to it.

Q. What did you say with regard to that?

A. I told him—I referred to the arrangements we had with him, told him that I felt we had carried out our agreement fully.

Q. Did you admit that the company had promised him, as a part of this settlement, steady work as long as he wanted it?

A. Just in the way that we had, under those conditions, yes.

Q. What was that way? What conditions?

A. Our usual custom with men to give them steady employment after they had been hurt; finding work that they can do, and looking out for their interests.

(Testimony of A. Mareen.)

Q. Well, did you admit that the company had made an agreement whereby they had bound themselves to give him work as long as he wanted it?

A. Just in that connection, those conditions.

Q. That was it, and did you at that time, then, say that they had agreed to give him work, and then turn around and say you wouldn't do it?

Mr. SMITH: Of course I have no objection to counsel putting in his case. Of course I don't examine a witness the way he does, but I think he is too leading.

COURT: Let him state what he said.

Mr. SMITH: That is all right. We have no objections to stating what he said.

COURT: If you want to call his attention to some special statement Mrs. Parker made, ask him what she said.

Mr. SMITH: We have no objection to anything of that kind.

Q. Well, state fully what was said, and just the words as near as you can, that were used at that time.

A. I talked to Mrs. Parker a good deal along the lines, as a man of experience would talk to the mother of a boy, of a young man, and it was more along that line. I regretted very much the circumstances, and felt keenly interested in the case, felt bad for the man; and my talk with her was along that line. I sympathized with her misfortune on losing the boy, the other boy, and it was a sympathetic conversation. She asked me—said she had a daughter that was a stenographer, and wanted to know if we couldn't find em-

(Testimony of A. Mareen.)

ployment for her. I told her we had nothing at the present time, but I would bear the matter in mind.

Q. How long was this conversation at this time?

A. It was quite a long conversation. I should judge perhaps an hour and a half or two hours they were in the office.

Q. Mrs. Parker in her testimony says that Mr. Mareen admitted that the C. A. Smith Lumber & Manufacturing Company had promised him work. Is that true?

A. That is correct.

Q. You had promised him work?

A. I had promised him work, yes, sir.

Q. She testified that the Smith Company, in the settlement with him that fall—that you said that the Smith Company, or admitted that the Smith Company, in the settlement they made with him on account of his hand, promised him, guaranteed him work.

A. Under the arrangement that I explained to him.

Q. Under the arrangement you explained to him?

A. We promised him work under the conditions that I explained to him at the time of this settlement.

Q. This was a part of this settlement?

A. What is that?

Q. I say as a part of this settlement, you promised him work, as long as he wanted to. That is the gist of her testimony?

A. No.

(Testimony of A. Mareen.)

Q. When was it that you first promised him work, and that he could have it as long as he wanted it?

A. The first time I talked with him in the office.

Q. The first time you talked with him after he was hurt, and you—how often did you repeat that?

Q. What is that?

Q. How often at other times? How many other times did you tell him he could have steady work?

A. I outlined the proposition at that time, and while it might have been referred to at our other meeting, it was taken care of that time.

CROSS EXAMINATION.

Questions by Mr. SMITH:

Mr. Mareen, you said that when you first talked with him, and at the other talks about work that you promised him steady work.

A. I qualified by telling him what we—what our custom was, and that we would give him steady work just the same; that the fact that he had lost his arm wouldn't deprive him of that usual thing with us.

Q. And you made this settlement for—this settlement in this release that is in evidence, before he went back to work steadily, didn't you?

A. Made this settlement?

Q. Yes. A. No.

Q. He wasn't working when this was signed, was he?

A. He had worked before that was signed, and after the first talk I had with him at the office, as I remember it.

(Testimony of A. Mareen.)

Q. And how much is this settlement?

A. How much is it?

Q. Yes. I don't mean in dollars, but I mean in amount of his earning capacity?

A. I don't understand you.

COURT: You said it was half of his wages.

Q. Half regular pay, was it?

COURT: And the doctor's bill and the drug bill?

A. I presume the figures are half his wages.

Q. That is your presumption only?

A. That is my presumption. I didn't figure it out. Had nothing to do with the figuring.

Q. When was it he was hurt?

A. When was it he was hurt?

Q. Yes, sir.

A. Why it was—it was in 1908.

Q. Some time in the month of December, 1908, wasn't it?

A. Along that time.

Q. This is the correct date when he was hurt, the 16th of December, 1908?

A. I couldn't say as to that.

Q. And what day did you make this settlement with him?

A. This settlement with him?

Q. Yes, sir.

A. We talked settlement—

Q. No, I mean what date was this actually signed? This is the correct date, is it?

(Testimony of A. Mareen.)

A. I couldn't say as to that. It might have been—this date might have been put on, and this might have been made out two or three days before he signed it.

Q. Anyway, it was about the 25th of September, 1909?

A. About that date.

Q. And he was hurt December 16, 1908. Now, what was his daily wage?

A. Between that time?

Q. Yes, sir.

A. I think it was \$3.00. I am not sure.

Q. \$3.00 a day?

A. I am not sure.

Q. Now, did you pay him half his wages net to him, or did half his wages include the doctor's bill, and you take the doctor's bill out of his wage and pay it?

A. His settlement—half the wages that were paid is figured half the wages that the party was earning before the accident; the wages we paid him at the time of the accident.

Q. Did you pay that to him net or gross?

A. I don't remember as to those figures, whether they were net or gross.

Q. Now, did you have any men down there at Marshfield that were working for you, who had been injured in the mill, and whom you had kept in your employment at that time?

(Testimony of A. Mareen.)

A. I couldn't state as to that. I think very likely that we did.

Q. But you don't know?

A. I couldn't swear to that, no, sir.

Q. Isn't it true that on this question of what you call your custom, that you told him your custom with the men in the east was to do that?

A. I don't know as to that. I might have told him that, but I think we had men employed around the plant at that time who were injured around the plant.

Q. But you won't swear to it?

A. I won't swear to it, no.

Q. Now, the main office of this company is in St. Paul, isn't it, or in Minnesota?

A. In Minnesota.

Q. C. A. Smith Lumber Company, and they had a big plant back there hadn't they?

A. At that time they had a plant in Minneapolis.

Q. How long had you been running your plant down here at Marshfield when this occurred in 1908?

A. The plant started in May, I think.

Q. May, 1908? A. I think so.

Q. And he was hurt in December?

A. No, he was hurt—

Q. December 16, 1908. I want to be right with you on those dates. Here is your date in here.

A. 1909, isn't it?

Q. No, that is the date of the settlement. I am asking for the date of the injury, December 16, 1908, isn't that the correct date there?

(Testimony of A. Mareen.)

A. That is the date here.

Q. Yes, sir. Now, wasn't your custom this: That when a man was hurt, that you paid him half pay, and took a release in full, and also gave him the job. Suppose they had refused to sign a release, what would you have done? Given him the job anyway or not?

A. We would have given him a job probably, until he commenced suit, if he did commence suit.

Q. Probably. You never had a case of that kind arise, did you?

A. I think we have, yes, sir.

Q. In this country?

A. I am not positive. Probably not before this suit. We have in this country, yes, sir, since then.

Q. Since then, not before?

A. No, I don't think so.

Q. Isn't it true that after he went back to work for you, that his work was satisfactory?

A. Yes, his work was satisfactory, as far as he could do it.

Q. Yes, sir, and—

Q. Under his condition, we realized—

Q. He took care of his work when the mill was cutting 35,000 feet a day?

A. Yes, sir.

Q. And you afterwards increased to what capacity?

A. I think we got up with our mill before it was built over, while he was working there, to 160,000 a day.

Q. And he took care of his work then, didn't he?

(Testimony of A. Mareen.)

A. He did after we fixed over the trimmer, yes, sir.

Q. And you fixed the trimmer especially for him, didn't you?

A. Yes, sir. We fixed the trimmer over after we found he couldn't do his work properly.

Q. And you fixed it so that with one hand he could handle it and do the work fully as well as a man with two hands.

A. We fixed it the same as the other trimmers at the other mill with air lifts, so he could do his work, and do it in keeping with the requirements.

Q. And what was this statement you say you made to him about this suit as administrator for his brother's death?

A. What was the statement?

Q. That you made to him?

A. I called him over one evening, and asked him to drop the suit, asked him if he didn't realize that it would be the means of his losing his position.

Q. What did you mean by that?

A. What did I mean by it?

Q. Yes.

A. I meant that we couldn't conscientiously keep him employed.

Q. Did you mean that you would discharge him if he didn't?

A. That is what he asked me.

Q. Did you mean that yourself?

A. What?

Q. Did you mean that in your statement?

(Testimony of A. Mareen.)

A. I meant at that time when he left to attend the law suit we would put another man in his place, and the place would be taken. That is what I meant at that time.

Q. You didn't tell him if he went to attend the law suit you would put another man in his place?

A. No, told him would be the means.

Q. Didn't tell him when it would be the means?

A. No.

Q. Or anything about it?

A. No. I wanted to give him all the chance in the world to stop the suit.

Q. You knew he didn't have any personal interest in that case? A. What?

Q. You knew he didn't have any personal interest in the case. He was simply administrator.

A. No, I felt he did have a deep interest in it.

Q. You felt what?

A. I felt that he did have a deep interest in it.

Q. I say, not personally. It wasn't he. He didn't sue himself personally?

A. Well, I felt that way, that he was the one that was responsible for the suit.

Q. Didn't you say that he told you that it was not his fault that he was appointed administrator, that the rest of the family had forced it on him?

A. Yes, that is what he told me.

Q. Yes, sir; and there was the mother, and you knew the relation between that dead brother and the mother, didn't you?

(Testimony of A. Mareen.)

A. Yes, sire.

Q. That she was dependant upon him for support, didn't you?

A. No, I didn't know as to that; had no reason to; no reason to know that.

Q. You knew that Parker had a family of his own, didn't you?

A. Yes, sire.

Q. How long had you known the brother before he was killed?

A. I don't remember of knowing him at all. I wouldn't recognize his brother. I probably knew him by sight, but I don't think that I was acquainted enough with him to recognize him.

Q. Now, that mill is still running, isn't it, down there?

A. Yes, sire; has been built over and still running.

Q. And there is lots of work there, he is able to do, and could do?

A. Same now as then.

Q. Same now as then?

A. Yes, sir.

Q. And when he called you up and wanted to go back to work, there was work that he could do, wasn't there?

A. The mill wasn't running at that time, I don't think.

Q. Now, will you kindly answer my question. Wasn't there work there he could do at that time?

A. Not at that mill. Yes, would be work there he could do.

(Testimony of A. Mareen.)

Q. And do it well, satisfactorily. Earn his money, give you value received for his money, couldn't he?

Mr. GOSS: That is all admitted in the pleadings.

Mr. SMITH: No, you claim the mill was shut down.

Q. How many mills did you have?

A. Two. We have three now.

Q. Now, Mr. Mareen, how many times can you recall now, that Mr. Parrker, either by telephone, or by personal application, asked you to take him back to work, after he was discharged, because of his brother's case, and before this present suit was instituted, either the one in Coos County—I will go even further—he sued you once in Coos County and dismissed; that is, in this same matter.

A. I believe so.

Q. And then started this one. Now, then, between the time he was discharged, when he went down to attend to the dead brother's case, and the time he started the case in Coos County, how many times did he apply to you for work?

A. Just that once over the telephone.

Q. And when his mother was there?

A. And then he made an appointment, yes, sir.

Q. He told you his circumstances?

A. Yes, sir.

Q. And the mother told them to you?

A. He told me his circumstances. I don't think his mother did, no.

Q. In his mother's presence?

(Testimony of A. Mareen.)

A. Yes, sir.

Q. And also over the phone?

A. No, he didn't tell me the circumstances over the phone.

Q. When was this that you said Parker told you of his condition, and that he was unable to get employment, and wouldn't be able to sell his home, but would like to go to work?

A. He told me that during the conversation before his mother.

Q. And that was when you told him that you didn't think he should go to work the way things were?

A. Yes, sir.

Q. And all in the world was his brother's case?

A. The way he felt towards the company, I didn't think it was policy to go to work.

Q. How about the way the company felt toward him because he had sued on account of his brother's death? You say this conversation with Mr. Parker and his mother extended over how long a period of time?

A. An hour and a half or two hours, probably.

Q. What else was talked of there besides Mr. Parker's transactions with you?

A. The daughter. The application for the daughter's position.

Q. Mrs. Parker told you then, did she, about her daughter being a stenographer?

A. Yes, sir.

Q. And tried to get work for her? I believe that is all.

(Testimony of A. Mareen.)

QUESTIONS BY THE COURT.

Q. Mr. Mareen, did the plaintiff ever make any claim to the company for damages on account of his injury?

A. I don't think he did.

Q. Did he ever say anything to you that would indicate that he thought he had a claim against the company?

A. He did in this way: He felt that the losing of his—he said he felt the losing of his hand was due to the treatment of Dr. Dix, inefficient treatment, and that the company was—

Q. Responsible for his doctor?

A. It was the company's doctor, and they was liable.

Q. Now, at the time you asked him not to bring an action against the company of account of his brother's death, and intimated to him that if he did, he would probably lose his place with your company, did he say anything to you then about having an agreement with you?

A. No.

Q. By which you were to give him permanent employment?

A. No.

Q. Said nothing about that?

A. Nothing about that.

(Testimony of A. Mareen.)

CROSS EXAMINATION CONTINUED.

Questions by Mr. SMITH:

Q. When he talked to you about Dr. Dix he complained bitterly against him, didn't he?

A. Yes, sir.

Q. And he told you he was inefficient, didn't he?

A. He thought so.

Q. And told you that the company had hired an inefficient doctor, didn't he?

A. No, not just that light.

Q. Just in what light did he put it?

A. He said he felt the company was responsible because of the doctor we employed.

Q. Because the doctor you employed wasn't competent, wasn't that it?

A. What is that?

Q. Because the doctor you employed wasn't competent?

A. He didn't say so.

Q. What did he say?

A. It was the same thing.

Q. It amounted to that, didn't it?

A. Yes, sir.

Q. That he was charging that the doctor that you had furnished him was not a good doctor, was an incompetent doctor. That was it and that was the reason he thought the company was liable to him.

A. That was his talk, yes, sir.

(Testimony of A. Mareen.)

Q. And you had taken a dollar a month from his wages, like you had the other boys down there. What did you take—a dollar or half a dollar?

A. I didn't know that a half dollar had been mentioned.

Q. No. I am asking you. I don't know. What was it? A dollar or half a dollar?

A. A dollar.

Q. For that purpose?

A. A dollar a month.

Q. And that was to be devoted for furnishing surgical aid and attention in case of injury?

A. That went to Dr. Dix for his services.

REDIRECT EXAMINATION.

Q. What was it that he claimed in regard to this, as against the doctor? Was it with regard to the way that he treated him, or to the doctor's ability in general?

A. He claimed that he hadn't attended carefully enough to the case, more than anything else.

Q. Now, you have been questioned in regard to the custom of the company. How long have you been connected with the company?

A. Since 1889.

Q. Since 1889. Were you connected with it first back in Minneapolis?

A. What is that?

Q. You were connected with it back in Minneapolis?

A. Yes, sir.

(Testimony of A. Mareen.)

Q. As an officer of the company, superintendent?

A. Same position.

Q. Then this is the same company that was operating in Minneapolis?

A. I am general superintendent of all the companies under that name.

Q. Now, this trimmer that was fixed over in the mill. You say it was fixed over?

A. I can't hear you.

Q. Put air on the trimmer?

A. Yes.

Q. I don't know as the jury understands what that means. Explain what that means, by putting air on the trimmer.

A. The old way of handling the trimmer is with a lever that you have to pull, pull the saws up. The frame that handles the saw that goes up and down is connected with these levers, if you want to trim off the lumber various lengths, you pull up the saw by pulling or lifting that way; and in putting on the air lifts, the air does the lifting, and by pressing the button, or opening up a manifold valve, it lets the air into the cylinders and lifts up the saw; throw the lever the other way, and it lets it down. One way it takes the power of a pretty good lift of the arm to lift the saw; the other way, just a touch or very slight operation will handle the saw.

Q. And this trimmer that he worked on was, after he had worked on it for awhile, equipped in that manner with air?

(Testimony of A. Mareen.)

A. Yes, he was complaining the work was hard, and we were also getting poor work from the trimmer, due to the increase of the amount the mill was cutting; for these two reasons we made the change.

Q. Are there any other trimmers down there equipped with the air?

A. The ones over at the large mill are equipped with air; what we call the main mill.

Witness excused.

A. L. BUTZ

A witness called on behalf of the defendant, being first duly sworn, testified as follows.

DIRECT EXAMINATION.

Questions by Mr. GOSS:

What is your occupation?

A. Time keeper?

Q. Where?

A. At the C. A. Smith Lumber Company's plant, Marshfield, Oregon.

Q. How long have you been in this position?

A. Since 1910, in this position.

Q. Since 1910?

A. Yes, sir; November.

Q. As such, what do your duties include?

A. Well, make records of the time, make out pay-rolls, fill in the rates, also it has been a report of the accidents, settle accidents, such work as that has been connected with the time office.

Q. Did you have charge of the time of the men worked, etc., ect?

(Testimony of A. L. Butz)

A. Yes, sir.

Q. Kept track of that?

A. Yes, sir.

Q. Are you acquainted with the plaintiff, Mr. Parker?

A. Yes, sir.

Q. How long have you known him?

A. Well, I first knew of him about 1907, I believe, the year that construction was being started, though I wasn't closely acquainted with him at that time; I knew him only by sight.

Q. Were you timekeeper throughout the time he worked for the mill after you went to work there?

A. Yes, he worked in the mill after I was time keeper. He worked in the mill on the east side.

Q. Were you time keeper at the time he was hurt?

A. The first injury?

Q. Yes. A. No.

Q. When did you start in as time keeper.

A. When did I start keeping time?

Q. Yes. A. November, 1910.

Q. November, 1910?

A. Yes, sir.

Q. At that time where was Parker working?

A. He was working on the east side mill.

Q. Working at the east side mill?

A. Yes, sir.

Q. In what capacity?

A. As trimmer man, if I remember correctly.

Q. As trimmer man? A. Yes, sir.

(Testimony of A. L. Butz.)

Q. Do you remember anything about how long he worked there?

A. He started trimming at the time the mill started, and with the exception of one time that he quit, and again that he was off, he stayed there, I believe, until January, 1913.

Q. You say with the exception of one time he quit?

A. Yes, sir.

Q. When was that?

A. That was September, 1911.

Q. And how do you know he quit?

A. Well, he came to me during the middle of the week and asked me if the foreman had said anything to me about raising his wages. I told him no. Well, then, he said, "Have my time ready Saturday night. If he don't raise my wages, I am going to quit." Said he could make more money doing something else.

Q. What did he say he was going to do?

A. He didn't state at that time what he was going to do.

Q. Said that he was going to quit?

A. Said he was going to quit, said he was through Saturday night.

Q. And did he quit at that time, do you know?

A. He didn't come back the next Monday morning, wasn't there that week, and I think something along—I don't know exactly. I think probably ten days he was off.

Q. Did you have any other conversation with him in regard to that?

(Testimony of A. L. Butz.)

A. Not just at that time.

Q. Did you at any other time?

A. Not bearing on the fact that he was going to quit.

Q. Well, did he at the time you made this—did you see him from time to time while he was working there, and at that time he quit that time?

A. I did.

Q. What did he say with reference to his job or contract of his employment?

A. He never mentioned any contract to me.

Q. Now, after he quit that time and came back, did you have any conversation with him?

A. No, I didn't; not regarding his return to work. I don't know what the circumstances were about his return.

Q. You say he was put back to work again there later at that time?

A. Yes, sir.

Q. And that was all the conversation you had with him in regard to that?

A. Regarding his quitting yes.

Q. Or regarding his job?

A. He never mentioned to me that he was promised a job or anything of the kind.

A. Well, you say he quit again later on or took a lay-off later on. When was that?

A. Following, that is?

Q. Yes.

A. That was in December, or January, 1913, I believe, when he quit to go to his brother's trial.

(Testimony of A. L. Butz.)

Q. Did he say anything to you about that?

A. No, he didn't mention it to me at all.

Q. You say he quit to go to the trial?

A. He went to his brother's trial. I couldn't say whether he quit or under what circumstances he went.

Q. You had no conversation with him about that?

A. No, about his brother's trial.

Q. Did you afterwards?

A. Not about his brother's trial.

Q. Well, when next did you see him personally?

A. I saw him frequently, and would pass the time of day as we met. I had an extended conversation with him along the latter part of March at the log dump. I was on my way to the Bay City mill, and he was there.

QUESTIONS BY THE COURT.

Q. When he quit in January, how long was it before he returned?

A. I couldn't say. I don't know what length the trial was.

Q. You say you had a conversation with him in March. Where was he working then?

A. He wasn't working for the company then.

Q. What I want to know is, how long after he quit in January to go, you say, to his brother's trial, was it before he came back to work for the company?

A. He didn't come back to work after his brother's trial.

Q. Oh, didn't come back at all.

Mr. SMITH: He hasn't been able to get back.

(Testimony of A. L. Butz.)

Q. This was some time in March you say?

A. As near as I can place it, yes. I know it was pretty stormy weather.

Q. What were you talking about?

A. He was talking with the man in charge of the log dump about writing an insurance policy for him. We were talking about general conditions, and how he was getting along.

Q. What did he say?

A. Said was making more money than he had ever made before; told me he wrote about six accident policies that day, and was going to write the seventh for the man at the dump; also told me he had written about \$40,000. insurance in Curry County.

Q. \$40,000? A. Yes, sir.

Q. Did he say anything about having quit, or having left the job, or anything about the job?

A. He said he was sorry they took him back, that he was making more money since than he ever had before.

Q. Sorry they took him back?

A. Yes, sir.

Q. I thought they hadn't taken him back?

A. That was the time took him back in December. He expressed the sentiment he would have been ahead if he hadn't had employment at the time. He had had a very lucrative business.

Q. That was September?

A. Yes, sir.

Q. Did he mention September?

(Testimony of A. L. Butz.)

A. No, he didn't mention the month of September, but he said the other time.

Q. The other time he quit?

A. Yes.

Q. Did you have any other conversation subsequent to this?

A. Subsequent to this conversation?

Q. Yes.

A. Not that I recollect.

Q. Do you know what the orders were, or law—orders so that you know in regard to agents and sellers around the plant in working hours?

A. None of them are about the work in working hours; not permitted to be there at all.

CROSS EXAMINATION.

Questions by Mr. SMITH:

Now, when you say he went down to his brother's trial, did you swear awhile ago he wuit to go down there?

A. I don't think so.

Q. Let's have the record then, and see whether he did or not.

COURT: I think he used the word "quit". What he meant, stopped work.

A. He was no longer in the employ of the company after he went to his brother's trial.

Q. That was the same, king of quitting he had before?

A. No, sir.

Q. Not the same kind?

A. No, sir.

(Testimony of A. L. Butz.)

Q. Did you understand it to be the same kind or a different kind?

A. I understood to be different.

Q. You understood to be different?

A. Yes.

Q. And when he went down to his brother's trial there, did you understand he still had a right to come back and work for the company?

A. No, sir. I didn't; I never understood that.

Q. You say that "quit" was before then?

A. I didn't understand he was coming back to the employ of the company after that.

Q. That was a different "quit" from the last time?

A. He didn't quit the last time that I know of.

Q. Now, will you answer the question? You said that he quit twice. When he went down to his brother's trial, did you understand that terminated his employment?

A. No.

Q. You didn't understand that?

A. I was not told that.

Q. Which one of the quits did terminate his employment?

A. That one naturally did.

Q. That one naturally did? A. Yes.

Q. And that was a different one from the other, was it?

A. It was.

Q. When he told you once he quit because his wages were not raised he came back.

(Testimony of A. L. Butz.)

A. Didn't mention to me.

Q. You didn't have to ask the company?

A. No.

Q. Did you strike him from the payroll.

A. I did.

Q. Did you report to the superintendent?

A. Reported to the mill foreman.

Q. Did you report to Mareen, or any one of that kind?

A. I don't know they were there at that time.

COURT: You had nothing to do with that—employing the men?

A. No. Made up the rolls, made up the time books. A man not in the employ of the company I struck his name off the payroll the next month.

Q. Have you your payrolls or books here with you?

A. I have the books here showing the time he quit in September.

Q. Did he quit or lay off?

A. The time he told me he quit.

Q. Get your book. Let's see what it does show.

A. I believe they are in front of Mr. Goss.

Q. (Getting books) Is this kept in your handwriting?

A. My handwriting, but the figures are kept by the mill foreman of the Bay City Mill.

Q. What page do you say tells this time?

A. I think the first page for that month.

Q. All right, turn to it.

A. It is right here.

(Testimony of A. L. Butz.)

Q. How long was he gone?

A. No. 407. He was gone from the 23rd until some time in October.

Q. What time in October?

A. Some time the fore part of the month; I couldn't say what date.

Q. Have you the book here?

A. I have.

Q. When does it show he came back to work?

A. Shows he came back to work the first day of October.

Q. The first day of October? You knew that when you said the fore part a moment ago. That he went back the first of October. You say he quit the 23rd of September, and came back the first of October—is that right?

A. Yes, sir.

Q. He was absent one week?

A. One week.

Q. He frequently took a week off?

A. No, sir.

Q. Didn't he frequently take a week off?

A. Not without the consent of the foreman.

Q. You don't know what he said to the foreman about this.

A. The foreman related to me.

Q. I ask of your own knowledge. Were you present when he had a conversation with the foreman about this?

A. No.

(Testimony of A. L. Butz.)

Q. Now, do you know of your own knowledge, how he got back the first of October?

A. No, sir.

Q. He just came there and went to work, didn't he?

A. As far as I know.

Q. Was there anybody else present at that time in September when you say he told you he was going to quit?

A. No, sir.

Q. Now, about wages; that came up about wages, you say?

A. Yes, sir.

Q. When he started to work, they were running how many thousand feet a day?

A. He was there when the mill first started; cut very low on the start.

Q. What was it.?

A. I couldn't say. I have no charge of it.

Q. Were you there about the mill?

A. I was about the mill usually an hour a day, an hour and a half a day.

Q. In September, 1911, how many feet was he handling a day?

A. Probably handling 30,000 to 50,000, depending on the quality of the log, and the way everything worked.

Q. How many feet were being handled at the mill at that time?

A. The mill?

Q. Yes.

(Testimony of A. L. Butz.)

A. That would be about the amount.

Q. That was the capacity of the mill, was it?

A. Not the capacity, because we gradually worked up, as things ran smoother; the capacity at the start.

Q. From that 30,000 to 50,000 to what capacity did that mill work?

A. I couldn't give you only my judgment. I should say probably 100,000 a day.

Q. And were his wages ever increased?

A. No.

Q. As the capacity of the mill increased. Do you know what the going wage down there was for trimmer work when they had about 100,000 a day.

A. Depended on the quantity of work.

Q. Well, what was it?

A. \$3.00 always a day always has been on that side of the bay.

Q. What was it just the other side of the bay for the same amount?

A. \$3.50.

Q. \$3.50?

A. Yes, sir.

Q. And he was doing as much there as they were across the bay for the \$3.50?

A. No, sir.

Q. What was the difference?

A. About 100,000 feet per day per month.

Q. How much?

A. About 100,000 feet per day per month.

Q. And across the bay?

(Testimony of A. L. Butz.)

A. Across the bay the output was about 400,000 a day with two trimmer men.

Q. And did you hear the statement of the witness Mareen as to what capacity they got up to there?

A. At the east side mill?

Q. Yes.

A. I didn't notice any particular answer.

Witness excused.

F. KESTER.

A witness called on behalf of the defendant, being first duly sworn, testified as follows.

DIRECT EXAMINATION.

Questions by Mr. GOSS:

What is your age?

A. 37.

Q. Where do you reside?

A. Marshfield, Oregon.

Q. What is your occupation?

A. I am now a shortage clerk for the C. A. Smith Lumber Company.

Q. A little louder.

Q. Shortage clerk, C. A. Smith Lumber Company.

Q. Shortage clerk?

A. Yes.

Q. How long have you been employed by the Smith Company?

A. Four years.

(Testimony of F. Kester.)

Q. Are you acquainted with the plaintiff, Mr. Parker?

A. Yes, sir.

Q. When did you first know him?

A. I believe it was in 1910. I believe in May.

Q. When did you say it was?

A. In May 1910.

Q. May, 1910. At what were you employed at that time?

A. The time I met Mr. Parker?

Q. Yes.

A. I first started in helping the construction foreman putting in machinery, moving them.

Q. Was he working there with you then?

A. Well, I believe Mr. Parker was at that time time keeper.

Q. Well, did you at any time while you were working there, work alongside Mr. Parker any place?

A. Yes, after the mill was started, I worked with him. He was trimming, and I was throwing lumber on the trimmer.

Q. Did you at that time have any conversation with him relative to the work, or relative to the jib?

A. Well, I don't exactly remember that we had anything pertaining to the job at that present time on the start, but later on, we did.

Q. When was that?

A. I think it was the time, possibly two weeks before, Mr. Parker quit to get more wages.

(Testimony of F. Kester.)

Q. What did he say? What at that time, if anything?

A. Asked me if I would take his position as foreman if he quit, to see if he could get more money.

Q. He asked you if you would take it?

A. Yes, if I would, and asked me not to take it, in other words.

COURT: Asked you not to take it if he quit?

A. Yes, sir.

Q. Did he give any reason for asking that?

A. Any reason for asking me that?

Q. Yes.

A. Why, he gave the reason that he was going to quit and demand the company to give him more wages, is the way I understood it.

Q. Well, did he give any reason why your not taking the job would help him?

A. Well, he gave—the way I understood it was that I was the only one; I had had some experience in pulling these levers on the trimmer, and as I understood it, I was the only man that they could call on to do that job. If I didn't take it, why, there would be nobody else in the mill, that could, on account of my throwing lumber on the trimmer, I would have more or less experience pulling those levers.

Q. Well, did you have any other conversation after that about his quitting the company?

A. Well, I think the night before he quit; if I remember correctly, was Saturday evening that he quit. I am not positive. I think it was Sauturday evening;

(Testimony of F. Kester.)

two or three days previous to that, he had been asking the foreman, Mr. Rourke, for more wages, and Mr. Rourke hadn't given him a satisfactory answer, so he agreed to give it to him that Saturday evening. I am pretty positive that is how it was. Mr. Parker was to meet me at Marshfield, at the appointed time that evening. I forget the hour, and he was to let me know if he had received his raise or not. I went to Marshfield to meet Mr. Parker, and he sent his brother that has been mentioned here before. Mr. Parker sent him in his place in account of his being sick. He wasn't able to come that evening, so he sent his brother.

Mr. SMITH: We object to that conversation. It is with his brother—his brother is dead.

A. Yes, sir.

COURT: Never mind about the conversation with the brother. If you had a conversation with Mr. Parker about it.

A. No, I was giving the reason why I didn't have a conversation.

Q. We don't care about that. You didn't have a conversation with him.

A. No, sir, he didn't meet me at that appointed time.

Q. Did his brother bring any message from him?

A. Yes, sir.

Q. Was that verbal or how was it?

A. Verbal.

Q. What was it?

(Testimony of F. Kester.)

Mr. SMITH: Object to that as incompetent.

COURT: I don't think you can prove it that way.

Mr. GOSS: Save an exception.

Q. When next did you have a conversation with him about it?

COURT: Haven't you replied that Mr. Parker was at work the next week?

A. The next week?

COURT: After that Saturday?

A. After that Saturday, no, sir.

COURT: He was not at work?

A. No, sir, he was not.

Q. After that, did you have any other conversation with him relative to his job, or relative to this work?

A. You mean after I had—

Q. After this time that he quit?

A. Yes, I did in a week after that, possibly.

Q. A week after that. Where was that?

A. First I saw Mr. Parker, he came over the Sunday morning. That was the Sunday morning after the Saturday evening he promised to meet me, and he told me he was looking for the foreman. I was watchman, at the time at the mill, Sunday watchman. It was Sunday. I directed him where he could find the foreman, Mr. Rourke.

Q. What did he say, if anything, about the work at that time?

A. He said he was going to ask for his position back.

Q. That is what he told you?

(Testimony of F. Kester.)

A. Yes, sir, he did.

Q. Anything else said at that time?

A. No, Wasn't much said. Nothing much more was said, because there was, I suppose at the time, hard feeling at me.

Q. Why? Had you taken his place while he was gone?

A. Yes, sir; that is what my intention was at that time when I met Mr. Parker.

Q. When did you see him again?

A. I think it was Monday morning when he came to work.

Q. He went back to work, and in the meantime, had he been off, you say?

A. Well, I don't know where he had been.

Q. I mean off the job.

A. Oh, yes, yes, sir; while I was holding the job, he was off the job that week.

Q. What was said then, if anything about the job?

A. Between he and I?

Q. Yes, or that you heard him say to any one.

A. Well, I didn't hear him directly say to anybody anything.

Q. Well, when did you have any—did he say anything to you about it?

A. After he came back, you mean?

Q. Yes.

A. Well, yes, he did say quite a lot; blamed me for his not getting the raise.

Q. Blamed you for it?

(Testimony of F. Kester.)

A. Yes.

Mr. SMITH: For what?

COURT: Blamed him for his not getting the raise.

Q. And after that, did you see Parker right along?

A. Yes, sir, I worked on the trimmer putting lumber on.

Q. Well, did you have any disagreement or hard feeling between you and Parker?

A. Well, I always imagined there was some hard feeling on his part, yes. I always imagined he held that against me.

Q. Well, was anything further said at any time to you in regard to his job?

A. Yes, sir.

Q. What was it?

A. He accused me of being the cause of the loss of his not getting the raise in salary. That was always the argument he put up to me.

Q. Did he say anything about the job, his wanting the job?

A. Yes, he wanted the job, but he wanted it more at an increased salary.

Q. After that at any time, did he say anything about losing the job, or anything further with reference to his position there—at any time?

A. Yes, quite often.

Q. What did he say?

A. Said that job was worth more money that he was getting.

Q. Well, did he ever approach you with any business proposition in regard to the job?

(Testimony of F. Kester.)

A. Well, at one time, yes, he did.

Q. When was that?

A. He spoke about buying a pool room if he could get a bargain on a pool room, in an off-hand way. I understood it, and took it to mean that way, if I would go with him in the pool room proposition, he didn't care if he lost his position. Several times we mentioned different ways, and he said he didn't care if he did lose. His intention—his intention was to get a cigar stand or pool room, or something; that he was tired of the work; the work was too hard for him.

Q. When was that? While he was working there at the mill?

A. Well, at times during the day that the mill happened to be down for other causes.

Q. I mean, while still employed at the mill?

A. Oh, yes; yes, sir.

Q. Did you have any other conference with him at any time in regard to any other business, anywhere?

A. I can't recall any.

Q. Did he ever speak of going anywhere else to work for the company?

A. For this particular company? Q. Yes.

A. Yes, he told me that he had been offered by the company, a position in Bay Point.

Q. Where is Bay Point?

A. California, somewhere, about Port Costa, in there some particular place. Never been there myself.

(Testimony of F. Kester.)

Q. Well, it is down in California?

A. Yes, sir.

Q. What did he say about that?

A. He said that the company had asked him to go to Bay Point and take charge of their dry kiln, as I remember correctly; it would be an easier place for him; he would have some few men under him, as I understood it he didn't mention the amount, particular amount of men; it would be very east work for him, much easier than the trimmer.

Q. Did he say whether or not he was going to take it?

A. Sir?

Q. What did he say about taking the job?

A. He said he wasn't inclined to take it. He said he wasn't going down, because he had his property here, and didn't care to leave here on that account.

Q. Did he have a conversation with you in regard to his law suit?

A. Well, I often heard him mention suing Dr. Dix, I didn't pay any particular attention; in fact, I hardly can recall.

Q. Did he ever state to you anything with regard to any contract he had with the company for his job?

Mr. SMITH: That is objected to.

A. As to holding his position?

COURT: Did he ever say anything to you about the position of the company—the agreement he had with the company?

A. I never understood he had any agreement.

Testimony of F. Kester.)

COURT: Did he ever say anything to you about it? What did he say about it?

A. I don't believe he ever mentioned to me that he had any contract. I don't know that that was ever mentioned. I can't recall that. That he had ever had any contract. I don't remember that. I am sure he never told me he had a contract.

CROSS EXAMINATION.

Questions by Mr. SMITH:

Now, you say he had ill feeling towards you?

A. I say I presume that. I didn't say he did.

Q. What made you presume it?

A. On account of my taking his position, I understood. He told me—

Q. You took his position did you?

A. Yes, sir, for a week.

Q. One week only?

A. One week and two hours. 62 hours.

Q. And you knew he was simply trying to get a raise in salary. didn't you?

A. Yes, sir, I knew that.

Q. And you knew that he expected to come back to his job?

A. No, I didn't know that he expected to come.

Q. How is that?

A. No, I didn't know that.

Q. What was he asking for a raise in salary for, then?

(Testimony of F. Kester.)

A. I suppose if he got that, he would come back, but if he didn't get it, I didn't suppose he could come.

Q. He didn't tell you anything about he was going to quit if he didn't get a raise, did he?

A. Yes, sir.

Q. How is that?

A. If he didn't get a raise, as I understood it.

Q. Now, did he tell you that?

A. Well, I couldn't say.

Q. Don't you know he expected to get the raise?

A. Yes, sir.

Q. And he expected to come back there at a raised salary, didn't he?

A. He expected.

Q. Then he didn't expect to quit, did he?

A. I don't know that.

Q. Now, then, you say that he had ill feelings against you?

A. I presume that he had ill feeling.

Q. Although you presume he had ill feeling against you, he afterwards, while that ill feeling was existing, asked you to go into business with him—is that true?

A. Yesm he asked me that; he did, yes, sir.

Q. At the same time he had ill feeling against you, is that right?

A. I don't know as he did.

Q. How is that?

A. I suppose he did, yes.

Q. And he wanted to go in partnership with you—although he had ill feelings against you.

(Testimony of F. Kester.)

A. He didn't particularly ask me to go into partnership with him.

Q. What did he ask you about that pool room?

A. He mentioned going into a pool room in this way. He says, "Would you go in with me in a pool room," he says, "in case we get fired", was the way he put it, in different conversations. I don't know sure he mentioned he wanted me as a partner, or anything like that. I don't say he said that, but in an off-hand way, yes, sir, he mentioned that I would take it for granted that is what he meant. Whether financially or how, I don't know.

Q. In case we get fired? A. Yes, sir.

Q. Then he hadn't quit, had he?

A. I suppose not.

Q. Now, he was only gone a week, was he?

A. That is all.

Q. When he came back, who told you to give up your—to give the job back to him, or let him go to work there?

A. The foreman of the mill told me on Sunday Mr. Parker was coming back.

Q. Told you on Sunday; and notwithstanding that, you went to work on Monday?

A. No, I went to work throwing lumber on the trimmer on Monday, and he went up to the levers.

Q. How is that?

A. I was throwing lumber on the trimmer.

Q. Now, isn't it true that it was you who had the ill feelings against him, because he got his job back there?

(Testimony of F. Kester.)

A. No, sir, it was not.

Q. Didn't you shortly after he came back there, and was working at his old job, didn't you tell him then that you would get even with him?

A. Not that I have any recollection of, no, sir.

Q. Did you have any conversation with him along that line?

A. Yes, we talked it over later on, different conversations, but not—I don't know as I ever—I am positive I never made any remark that I would get even with him, because the foreman of the mill came to me, if I was willing to give up my position, he would take Parker back; or if I chose to hold the position. That was Mr. Rourke, the foreman. On Sunday I told him—

Q. Was that in Parker's presence, or not?

A. No, sir; Parker was not there.

Mr. SMITH: We move to strike that volunteered statement out.

COURT: I suppose it is a voluntary statement, but if it explains the fact he didn't have any ill feeling against Mr. Parker.

Mr. SMITH: Very well.

Q. Now, you say Parker blamed you for his not getting the raise?

A. That was my idea, Mr. Parker blamed me for it, yes, sir.

Q. That he didn't get the raise? What did he want with the raise if he had quit?

A. If you would call that quitting.

(Testimony of F. Kester.)

Mr. GOSS: May it please the Court, I object to that form of cross examination.

COURT: If he wuit for the purpose of compelling the company to raise his wages, then it is difficult for me to understand how he can claim it is a violation of the contract to give him employment. They didn't agree to keep him in their employ as long as he lived, and give him an opportunity to quit every week in order to compel them to raise his wages. The question is whether he voluntarily severed the relationship, if it existed at all.

Q. Now, then did you understand when he left there that he had quit for good, or that he was going back?

A. My understanding of it was that if he received more pay, what he asked for, he would come back. If he didn't receive it, that he would not come back. That is it.

Q. He didn't tell you anything of that kind, though?

A. He did previous to that. He said he was going to strike, the words he used. That he was going to strike for more wages. What the meaning of that is, I don't know, as I could exactly understand that myself. I suppose it would mean quitting. I don't know exactly.

Q. When men simply strike for wages, they don't throw up their jobs completely, do they? They simply ask for the raise.

A. Well, I don't know about that, sir. I never struck.

(Testimony of F. Kester.)

Q. Now, when was this you say he spoke about a position being offered him down at Bay Point ?

A. I can't remember exactly when that was. It was the time, I believe, before he struck for more wages, we will call it. I believe it was before that.

Q. Before he wanted more wages?

A. I believe it was, yes. I am positive.

Q. And he told you then he didn't want to go there on account of his home being at Marshfield?

A. Yes, that was the excuse he had, principall.

Q. Now, when Parker came back there and went to work you were throwing lumber on the trimmer, weren't you?

A. Yes, sir.

Q. And didn't he have another man put in your place there?

A. Who?

Q. Mr. Parker. Didn't he have the foreman put another man there instead of you?

A. No, sir.

Q. Well, weren't you removed from there? You quit throwing lumber on his trimmer, didn't you?

A. I quit later on. I got blood poisoning later on.

Q. How many days later?

A. I was working on the trimmer up to the time I got blood poisoning in my hand. Then Mr. Parker objected to my going back on after I got rid of the blood poisoning and came back to work. So the foreman took me away from the job.

Q. That was long before this case started, wasn't it?

A. Which case?

Q. This present case?

A. Oh yes.

(Testimony of F. Kester.)

Q. And because of that did you have any hard feelings towards him?

A. Towards Mr. Parker?

Q. Yes. A. On account of my losing that?

Q. Yes.

A. No, sir, because I was put in—I was put in another job at the same wages. It wasn't material to me whether I worked on the trimmer, or not.

Q. Did you at about that time make a threat to get even with him?

A. Not that I have recollection of, no, sir.

Witness excused.

Adjourned until 9:30 tomorrow morning.

Portland, Ore., Thursday, June 18, 1914, 10 A. M.

Mr. GOSS: I have to say that four of our witnesses, something has happened to them—I don't know what. They didn't get into Roseburg in time to catch the train, and didn't get in in time to catch the night train. I have a telegram from Roseburg that they got in a four o'clock. It embarrasses me to have to ask for any leniency in this case.

COURT: I don't know, Mr. Goss. It seems to me you will have to proceed with the trial of the case. I don't see how we can postpone it until that time. It will take them all day to get down here, if they started in an automobile.

Mr. GOSS: My advices are they should be here for the afternoon session, for they left there by four o'clock in the morning, and the roads are fairly good.

(Testimony of Dr. E. Mingus.)

Dr. E. MINGUS.

A witness called on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. GOSS:

Q. State your residence

A. Marshfield

Q. How long have you lived there? A. 15 years.

Q. What is your occupation? A. Physician.

Q. How long have you been a practicing physician?

A. 23 years.

Q. Are you acquainted with Dr. George E. Dix?

A. I am

Q. He is the only Dr. Dix there in Marshfield?

A. Yes, sir

Q. Has he been acting as the physician and surgeon for the employes of the C. A. Smith Lumber & Manufacturing Company? A. Yes, sir

Q. How long have you known him?

A. About five or six years

Q. Are you acquainted with his—have you had occasion to know his ability and skill as a physician and surgeon? A. Yes.

Q. What is that? A. Good.

Mr. SMITH: That is not competent in this case, That is not an inquiry here

COURT: I don't think that is a material inquiry in this case

(Testimony of Dr. E. Mingus.)

Mr. SMITH: No, not material in this case at all

Mr. GOSS: I offer to show by this witness that he is a competent physician and surgeon and his reputation in the community in which he lives, his general reputation, is such, and I thought I would show by Mr. Mereen they made inquiries and found he was competent and skillful.

COURT: There is no claim in this case of any liability against the company on account of the doctor. The contention here is that the plaintiff made such claims there of the company, and that claim was adjusted in a certain way. That has been adjusted and whether a valid claim or not, makes no difference.

Mr. GOSS: I wish the record to show this. Our contention, of course, is that wouldn't be a basis of any valid claim against the company, in any event. I understand the evidence is ruled out.

COURT: Yes, I don't think it is competent.

Witness excused.

Mr. GOSS: Under the circumstances, I am compelled to rest.

Defense rests.

JOHN E. PARKER

Recalled in rebuttal.

DIRECT EXAMINATION.

Questions by Mr. SMITH:

You were here yesterday and heard the testimony of Mr. Butz and Mr. Kester? A. Yes sir.

(Testimony of John A. Parker.)

Q. Relative to the time they claimed you quit, about your leaving for that week? A. Yes sir.

Q. Now I want you to speak plainly and distinctly, because it is a little difficult to hear. Do you know what the custom of the company was, how it handled the cases when men quit and severed their relations with the company?

A. When a man quit, he had to give three day's notice to the company that he was going to quit on a certain time, and wanted his money. And that night when he got through, on a certain time, when three days notice, over they gave him his check

Q. Did you ever give three day's notice of that kind? A. No, sir

Q. Did you get the check during that week?

A. I never did

Q. Did you ever quit their service at that time?

A. No sir

Q. I want you to tell the jury all about that. Tell them fully everything that was done. What did you do when you went off that week, and why did you go?

A. Why, I asked them during that week for more money, told them that the job was worth more money, and he said he didn't know, he didn't think would give it to me; said he would see Mr. Mereen

Q. Who said that?

A. Mr. Rourke, and I went to see Rourke Saturday night, and I said, "Mr. Rourke, did you see Mereen or not?" He said, "No, I haven't". I says, "Well, I am going to take a week off, going up on the ranch."

(Testimony of John A. Parker.)

"All right Jack". So I went off, and during the week I goes down and sees the superintendent, and I says, "Mr. Murch, I am going up on the ranch, and I will be down Monday". "Well," he says, "we need you pretty bad, Better go to work now". "Well," I says, "I been working pretty hard, a hard job over there, and I am going to take a couple of days off, and come back Monday" He says, "All right". I came back Monday, and went over to the mill and inquired for Rourke, I found him, and says, "I will be on the job tomorrow morning". "Well", he says, "I am awful glad you are here. The yard is full of rip and trim." The man in there, Felix, he called the name, doing bad work, and getting the yard full of rip and trim. And I come back Monday morning.

Q. Now, did you at any time quit the services of that company of your own volition?

A. I never did.

Q. And do you know about what statement was made to you by Mr. Mereen, or Mr. Murch, one of them, as to whether you would get \$3.50 a day when the mill got to running a certain capacity or something to that effect?

A. That is the understanding I was to get \$3.50 a day.

Objected to as leading

Q. All I want you to do is to tell the conversation you had with him.

A. The conversation I had with Mr. Mereen when I went on the trimmer, he would give me \$3.50 a day

(Testimony of John A. Parker.)

when the mill cut 100,000. He said when the mill got along cutting 125,000 the wages would be the same as it was at the big mill

Q. How much were you cutting at the time you wanted \$3.50

A. About \$160,000.

Q. Do you know about how much the trimmers in the big mill handled a day, a man, a single trimmer?

A. Well, there were two trimmers over there at that time. When a man got—when his machine was fixed like the machine was in the mill I was working in, with levers, they had two men, at least two men to pull the levers, they had two men to pull the levers in each case, and they were getting—one man got \$3.50 one man \$2.50; four men trimming 400,000 feet. I was trimming 160,000 and they were only paying me \$3.00 a day.

Q. Now did you ever tell either Mr. Mereen or Mr. Murch that you had quit? A. No sir

Q. Now, about this alleged quitting. What conversation did you have with Mr. Butz about it, if any?

A. Why I had nothing to say to Butz about quitting. That is the entire time. I never had any conversation with him whatever in regard

Q. Mr. Butz wasn't over you, was he?

A. No sir

Q. He was simply a time keeper?

A. He was just time keeper.

Q. Who had the right down there to hire men or discharge them? A. The foreman.

(Testimony of John A. Parker.)

Q. Did Butz have anything to do with that at all?

A. No sir

Q. Except just keep track of the time?

A. Just time keeper

Q. Now, about Mr. Kester, without asking you a number of questions, you heard his testimony here

A. Yes sir

Q. And I want you to make a full statement about all you remember of your talks with him, if you have had any, and any difficultied that came up between you and him, if any at all. Just tell the whole thing.

A. Well we worked for quite a long time there together. He was throwing the lumber on the trimmer, and on the start, why he was on what they call the long end. There is the front end and the long end. The man that stands on the long end is the man that moves up when the lumber gets shorter. The man on the front end is the man that stays in one place all the time, and he has to place the lumber so there is not too much to head in to waste, as the front end is always down. The lumber has to be trimmed a certain length and all the waste is generally on the far end of the trimmer. He wasn't strong enough for the job; he couldn't do it; but they still insisted on keeping him there—and after—the week I got off, I asked him if he wouldn't take my place for a week, he said he would.

Q. You asked him to take your place?

A. Yes, I asked him, I said, "Will you take my place while off?" "No," he says "I can't handle".

(Testimony of John A. Parker.)

Just like that. Says if in a pinch he would do it and we had different conversation along those lines. And when I come back why, he says, "You laid off, now you come back and take the job", he says, "Well", he says, "I will get even with you" just like that

Q. Did you ever ask him not to take your job?

A. No, I don't know as I did

Q. Now was there any talk between you and him about your taking him into partnership, or going into the pool business?

A. Yes we talked along that

Q. When was that? Before or after this week?

A. Well, I think it happened before.

Q. That was before. Have you any ill feelings against him?

A. Not in the least.

Q. What has been his attitude toward you?

A. Well, I always thought he was looking for a chance to get even, as he called it

Q. He made that statement to you, did he?

A. Yes sir

Q. Now, did you ever blame him for not getting a raise?

A. No sir

Q. Now, he spoke about your telling him that there was a position down in California by this same company. Was there such a position offered you?

A. Yes sir

Q. When was that, before this incident?

A. Oh, that was long before I—before my brother got killed, or before I laid off that week. That is long before that

(Testimony of John A. Parker.)

Q. But it was after you had been hurt, yourself?

A. Oh, yes.

Q. But long before any of this week lay-off came up?

A. Yes sir.

Q. What was that position that you were offered there in California?

A. Well, Mr. Mereen came to me and he says, "Jack," he says, "We want a man down in California". he says, "to look after the dry kilns", and he says, "If you are in shape to take it, I will offer it to you", stating the wages etc., and I told him—I told him the condition things were not; that my wife was sick, my home was right there in Marshfield, I didn't see as I could go.

Q. So you didn't go?

A. I didn't go.

Q. There was no difficulty with the company about it?

A. Oh no, he said that was all right.

Q. Now, what was your pay to be in California, do you know?

A. No, I don't know if he said then at that time or not.

-Q. Now, before you were discharged, that is, before your job was taken from you, did the company tell you in any way that any act that you had done, or were about to take, would cost you your job, or tell you that they would discharge you if you took any steps?

A. No, they didn't state right out that they would.

Q. Did you have any information or knowledge directly, that your handling your brother's case would sever your relations with the company?

(Testimony of John A. Parker.)

A. No sir.

Q. What, if anything, was said to you about that?

A. Why, all there was to it, Mr. Mereen asked me not to bring a case, and I asked him, after we were through talking, I says, "If I should bring this case," I says, "would I lose my job?" Just like that.

Q. What did he tell you?

A. He says, "No, don't know as you would".

Q. He said that he didn't know that you would?

A. Yes sir.

CROSS EXAMINATION.

Questions by Mr. GOSS:

Now you say the custom of the company is, when men quit, to give three day's notice?

A. When a man is going to quit?

Q. Yes. A. He has got to give three days' notice in order to get his money.

Q. In order to get his money. That is the law, of the state, isn't it?

A. I don't know anything about the laws.

Q. And that is the law of the state of Oregon; in order to draw his money right then? A. No sir.

Q. If he don't do that, he waits until the next pay day, is that it?

A. I don't think so. I never heard anything like that down there.

Q. When a man quits any time, if he gives three days' notice he can get his pay at the end of that time;

(Testimony of John A. Parker.)

if he doesn't he has to wait until pay day—isn't that true?

A. Well, I never knew of anything like that.

Q. Never knew that? Did you think if you didn't give three days' notice, you lost your pay altogether?

A. Well, Mr. Goss, I kept time there for a number of months. Nothing like that ever happened. If a man quit, he got his money; if he gave three days' notice.

Q. The company, as a matter of fact, always gave them their money when they quit, unless there was some good reason for not doing it, didn't they?

A. That is something I don't know anything about. I always—when a man came there and says, "Jack, I am going to quit Saturday night, this is Wednesday", when the time came, he would get his money.

Q. As a matter of fact, anybody who wanted to quit, didn't lose his money by not giving three days' notice, did he?

A. That was my look-out, to go and deliver the check to him.

Q. It was your look-out, but as a matter of fact, my question is, he didn't lose his money by not giving three days' notice?

A. No, he didn't lose his money, no sir.

Q. As a matter of fact, didn't you tell Mr. Rourke that you were going to have \$3.50 a day for that work, or you would quit?

A. I don't remember ever telling him that.

Q. You don't remember doing that.

(Testimony of John A. Parker.)

A. No sir.

Q. And didn't you go to the other men on the trimmer job around there, to any man you thought capable of that job, and tell them that you were going to quit, and have it fixed up if they didn't take your job you would get \$3.50? A. No sir.

Q. Not to any of them.? A. No sir.

Q. Didn't you tell Fred Moore you had fixed it up that way? A. No sir.

Q. And you had the company where they had to do it? A. No sir.

Q. Or anything to that effect? Didn't you tell Ben Matson, the yard foreman, didn't you ask him, or tell him after—at this time, when you laid off there as you call it, and he says you quit, that if the company didn't give you back your job that you were going to prosecute them for that kind of cars they were running there? A. No sir.

Q. Didn't have any similar conversation at all to that with Mr. Matson. A. No sir.

Q. And didn't you go to Mr. Dresser, foreman of the big mill, on the other side, and told him you had bunched in on the other side, meaning you had quit, and asked him got a position there? A. No sir.

Q. You didn't? You didn't tell Mr. Rourke at all that you had quit, or that you would quit unless you got better pay?

A. I don't remember.

Q. You don't remember. Now, you say when you called—when Mr. Mereen called you over after this—

(Testimony of John A. Parker.)

after you started this trial, that he told you you wouldn't lose your job? Is that what he said?

A. Yes sir, he didn't say I would, and didn't say I wouldn't.

Q. What?

A. He didn't say I would, and didn't say I wouldn't.

Q. Didn't he say it might be the means of your losing your job or that it would be the means of your losing your job?

A. He didn't say one thing or the other. When I left I asked Mr. Mereen, "If I bring this case, does that mean I lose my job?" And he says, "No, I don't know". Something like that.

Q. Yes, but didn't he say it would probably be the means of your losing it?

A. That is just the way he said it, the way I am telling you now.

Q. Yes, but I am asking you if he didn't say that it would be the means of your losing your job?

A. That is what he said. When I got to the door, I asked particularly, I asked, "Mr. Mereen, does this mean, if I bring this case, do I lose my job?" And he said, "I don't know as it does mean that you will lose your job".

Q. He said he didn't know as it did, but didn't he tell you before in the conversation you had there, it would be the means of your losing your job? That is what I asked several times.

A. I don't know as he did.

(Testimony of John A. Parker.)

Q. You don't know as he did? How long was this conversation?

A. Probably half an hour, three quarters of an hour.

Q. Well what was said in this conversation, what else?

A. Oh, we just talked about my brother getting killed, and how it happened, and all about it.

Q. Just what did he say about it? Let's see what else there was.

A. Well I couldn't remember the words, but it was along the lines that he was sorry it happened, and said the wood was put there—didn't know how the wood happened to be there, etc., you know.

Q. Didn't know how it happened to be there?

A. Said the wood was put there by the Smith company. Tom didn't have to move it, etc. He didn't know as the Smith company was to blame, he thought Tom was to blame.

Q. And he didn't think the Smith company was to blame at all in the matter.

A. That is what he thought.

Q. How did this case against the company turn out?

A. How did this case against the company turn out?

Q. Yes. A. Why—

Mr. SMITH: We will admit that to save the record, the verdict in the case was for the defendant,

(Testimony of John A. Parker.)

both of them, and it was sustained in the supreme court, and the appeal for a rehearing denied.

Q. When you went back to work on the trimmer there, you didn't start in Monday morning, did you, the first thing, with the work? A. Yes sir.

Q. Didn't you go in a few hours after the work was started?

A. No sir.

Q. Didn't Felix trim a couple of hours, and then you start?

A. No sir.

Q. You are sure of that?

A. The first morning after I got back from the trial?

Q. Yes. A. I started right away at seven o'clock.

Q. You went to see Mr. Rourke about that, Sunday, did you, about going back to work?

A. I saw him Sunday, and told him I would be back on the job Monday morning.

Mr. SMITH: That is when he said he was glad of it? A. Yes sir.

Witness excused.

JOHN F. BAIN.

Recalled by the plaintiff in rebuttal.

DIRECT EXAMINATION.

Questions by Mr. SMITH:

Mr. Bain, you were sworn yesterday I believe.

A. Yes sir.

(Testimony of John F. Bain.)

Q. How long did you work there at the mill?

A. I worked at the mill two different times; one time about four months, and another time about twenty-one months.

Q. During that time did you become acquainted with, and did you know what the custom of the mill was about giving money to the men or paying them when the mill has men who quit? A. Yes.

Mr. GOSS: Do you know about that? Did you have anything to do with the pay?

A. How is that?

Mr. GOSS: Did you have anything to do with paying the men?

A. I had nothing to do with paying the men more than to see that they got their money.

Mr. GOSS: You didn't keep their time?

A. I kept my men's time.

Mr. GOSS: And you delivered the checks to them?

A. Yes sir.

Mr. GOSS: You gave them the checks?

A. Not at all times, but generally speaking I gave them the checks, men that was working under me.

Q. Now then, it is that way, that you got acquainted with this custom about paying the men that quit, was it? A. Yes sir.

Q. Now then, will you tell the jury in your own way what that was, and explain all about that pay business.

A. The custom of the company, and the instructions to me was if a man wanted to quit his job, it

(Testimony of John F. Bain.)

was necessary for him to give me, the men that were working under me direct, it was necessary for them to give me three days notice that they wanted to quit in order to have a men put in their place. I would—when I received the notice from the men, I would usually turn it in to the time keeper, telling him that a certain man wanted to quit at a certain time, and on that certain time that the men wanted to quit, the time keeper would usually hand me his check, and I would deliver to the man at the quitting time, or thereabouts on the evening that he wanted to quit.

Q. So they did not just pick up their hats and walk off? A. No.

Q. In order to quit. About how many days' time did they usually give notice there?

A. The rule was that they were to give us three days' notice.

Q. And do you recall now—well, what is your recollection as to whether that rule was followed in at least a large majority of the cases, if not all? I remember distinctly that I got several callings from the other officials for not giving the three days' notice. At times I would overrule that and help the man to get his check if I could at any time.

Q. The custom was generally followed, was it?

A. Yes sir.

Mr. GOSS: That is leading.

(Testimony of John F. Bain.)

CROSS EXAMINATION

Questions by Mr. GOSS:

If a man wanted to get his pay right then, under the state law, he had to give three days' notice before he quit, didn't he? A. No sir.

Q. He didn't? A. No.

Q. Could he get it without that?

A. If he was a good bluffer he would get it.

Q. He would get it anyway? A. Yes, sir.

Q. Wasn't it the state law that he had to give three days' notice. A. No, it was not.

Q. It was not?

A. We were speaking of the custom of the company

Q. I am not speaking of customs at all. I am asking if it is not the law of the state.

Mr. SMITH: That is immaterial as far as this witness is concerned.

COURT: You can ask him. He seems to be very positive about the matter.

Q. He knows all about it. What did you say in regard to that? Isn't that the state law, and wasn't it then?

A. I say it was not.

Q. You say it was not? A. Yes sir.

Q. But it was the custom of the company to require three days' notice in order to give the man his pay?

A. It was.

Q. But in instances they would give the man his pay right off, would they? A. Yes, we did.

(Testimony of John F. Bain,)

Q. And you didn't go and hunt a man up and give him his pay, if a man gave notice, and was there at the time, you gave him the check. If the man quit, and wasn't there then you did not hunt him up and give him the check?

A. I did, in my case.

Q. You did in your case? A. Yes.

Q. If the man wasn't anywhere around the job, you would go and hunt him up?

A. Oh no, he was naturally supposed to be on the job.

Q. If a man quit, and wasn't there at that time, he had to go to the office to bet his pay?

A. After his three days' notice, his check was invariably handed to him.

Q. Yes, if he gave three days' notice, they gave you a check. And if the man came for it, and was there on the job, you gave it to him?

A. Yes.

Q. And if he wasn't, you didn't? A. No.

Q. And if he quit without giving you three days' notice the check wasn't given him?

A. Only in some instances.

Q. Yes, only in some instances. You were in the big mill on the—we will call it—the other mill, not the one Parker worked in?

A. I was in the mill Parker was working in at the time we were speaking of.

Q. When you were there. That isn't the mill they spoke about at the time he quit. That is the Eastside Mill?

A. No.

Witness excused.

Plaintiff rests.

(Testimony of A. Mareen.)

A. MEREEN.

Recalled by the defendant in rebuttal.

DIRECT EXAMINATION.

Questions by Mr. GOSS:

There has been some testimony here in regard to the custom of the company when men quit. What was the procedure followed there about men quitting and receiving their pay?

A. There is a state law that regulated that,—required the men to give three days' notice, and when they give that three days' notice, we have to pay them at the end of that three days when they quit. Otherwise, why, we would pay them at the regular pay day, the first regular pay day of the company. That is regulated by the state law.

COURT: If a man quit without giving three days' notice, he didn't lose that pay, but he had to wait until your regular pay day for it?

A. He had to wait out regular pay day for it.

Witness excused.

A. L. BUTZ.

Recalled by the defense in rebuttal.

DIRECT EXAMINATION.

Questions by Mr. GOSS:

You weren't working for the company at any time when Mr. Bain was, were you. A. Yes, sir.

(Testimony of A. L. Butz.)

Q. When did Mr. Bain leave the company?

A. I couldn't tell the date, because at that time I wasn't in the time office, but I believe it was some time in the early part of the summer. But as to what year it was, I don't recall.

Q. Well, it was long before this time Mr. Parker quit, was it?

A. Mr. Parker quit at Bay City?

Q. Yes. A. Yes sir.

Q. Now, with regard to his quitting, have you there the time back at that date?

A. For the Eastside Mill, yes sir.

Q. For the Eastside Mill—that was where he worked? A. Yes sir.

Q. Now, his name is in there in your handwriting, is it? A. Yes sir.

Q. Now, I will introduce this page, of the time book, with Mr. Parker's name on it, and the number 407, being the line it is on. I don't know what page in this book, not numbered, but the time book for the Eastside Mill for the month of September.

A. These sheets are—There are other months that follow, and previous to that it is all alternate months while one book is being figured up, they have another book to keep time on.

Q. This would be September and November, would it? A. September and November.

Mr. GOSS: I will offer these in evidence.

Mr. SMITH: We have no objection to that. These records were kept by you, were they?

(Testimony of A. L. Butz.)

A. The records of the time?

Mr. SMITH: Yes.

A. They were kept by the foreman and myself in conjunction.

Book marked "Defendant's Exhibit B".

Q. Now I notice that starting on the 24th that there is an X mark in each column there.

A. Yes sir.

Q. 24, 25, and 26. What does that X mark indicate?

A. Absent.

Q. Now right after that, I notice here "time" is written. What does that mean.

A. Means that he has quit, and wasn't supposed to be coming back. You will find it in other men the same way, who have quit previously to that time.

Q. Have you the time book for the next month?

A. Yes sir.

Q. Month of October. I notice the same number and the same line here.

A. Yes.

Q. 407, Jack Parker. Is that your handwriting?

A. Yes sir.

Q. And I notice there is a line drawn through that?

A. Yes sir.

Q. Did you do that?

A. Also the name above, you will notice.

Q. If you had the time—having quit in the month before, how does he come to appear in this month?

A. That time book was written up before the foreman told me absolutely that he wasn't coming back, although he had told me himself previously.

(Testimony of A. L. Butz.)

Q. Who had told you himself previously?

A. Mr. Parker.

Q. Oh, you get this up quite a time beforehand?

A. I made it up about four days before the first of the month, in order to get my work along.

Q. How do you make that up—copying the other one?

A. The October book is made up by copying off the September payroll, and if a man quits after I have written that up, his name is copied on that book, but I generally make a point before the book is delivered to the foreman, to take the name off there with ink eradicator, or drawing a line through it.

Q. You do that by drawing a line through it, as you did in this case?

A. Draw a line through it.

Q. I see he went to work there, and worked right along that month?

A. Yes, he came back on Monday morning, and proceeded to work. By what arrangement, I don't know.

Mr. GOSS: I offer this in evidence.

Mr. SMITH: Go right ahead.

Marked "Defendant's Exhibit C".

Mr. SMITH: If you wish Mr. Goss, so it won't interfere with your record, we will agree that you may dictate such parts as you wish in the record after we get through.

(Testimony of F. Kester.)

Mr. GOSS: It is understood by counsel that we may dictate in the record such parts as we wish, and withdraw the book.

Q. Mr. Butz, you were explaining that Mr. Parker—

Mr. SMITH: Excuse me, let, him tell what he wants to testify.

Mr. GOSS: I am not going to put anything in his mouth.

Q. That Mr. Parker spoke to you with regard to this himself.

Mr. SMITH: That was gone into yesterday, if the Court please. This is not surrebuttal.

COURT: He testified to that yesterday, about Parker telling him he was going to quit.

Mr. GOSS: All right, that is all.

Witness excused.

F. KESTER.

A witness called in rebuttal by the defendant.

DIRECT EXAMINATION.

Questions by Mr. GOSS:

You have heard Mr. Parker's testimony here that he just gave this morning, in regard to your asking him about this job, etc. etc. Will you state the facts with regard to that?

Mr. SMITH: That is objected to, he went into that yesterday.

(Testimony of F. Kester.)

COURT: Just ask whether he made the statement Parker testified to. He testified fully yesterday as to this work, and what Parker's was. No need to go into that again.

Mr. GOSS: Mr. Parker, as I understand, has added something to this.

COURT: Ask him about the particular thing Parker testified to. Don't go over the whole thing.

Q. Mr. Parker testified you asked him about taking that job if you thought you could fill it. Was there any such conversation?

A. Mr. Parker never asked me to take his job, no sir, he asked me not to take his job.

Witness excused.

Mr. GOSS: May it please the Court, I wish it to appear in the record, on this application for delay, that the witnesses I am waiting for are Mr. Dresser, Mr. Matson, and Mr. Rourke, and I presume it is proper at this time to make a motion for a directed verdict in this case.

COURT: Very well, you can have the record show that. I think there is testimony enough to go to the jury.

(Deposition of Catharine B. Parker.)

*In the Circuit Court of the State of Oregon for the County
of Coos.*

JOHN A. PARKER,

Plaintiff.

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation,

Defendant.

Deposition of Catherine B. Parker.

On the 13th day of September, 1913, at suite 307, Coke Building, Marshfield, Oregon, at ten o'clock, A. M. appeared the plaintiff by his attorney Wm. T. Stoll, and the defendant by its attorney John D. Goss, and also appeared Catherine B. Parker, the witness named and mentioned in the annexed notice. Now comes John D. Goss, on behalf of the defendant, and objects to this hearing or the taking of this deposition at this time and place, on the ground that the same is not properly noticed; that the witness is not about to leave the jurisdiction or the county, and that her presence could be readily procured at the trial of this cause, and that the order herein is not based upon a proper showing to allow the taking of this deposition at this time and place. Thereupon the parties proceeded to take the testimony of said witness, pursuant to the annexed notice, and the said Catherine B. Parker, being by me first duly sworn, to testify the

(Deposition of Catharine B. Parker.)

truth, the whole truth, and nothing but the truth, testified as follows:

By Mr. STOLL:

Q. State your name, age, and residence.

A. Catherine B. Parker, 58, Nova Scotia, in the Dominion of Canada.

Q. What relation, if any, do you bear the plaintiff?

A. Of course I am his mother.

Q. Do you intend to leave the county, and if so, when?

A. I intend to return to my home within a week, possible not for two weeks.

Q. Were you present on August 17th or 18th, 1913, at the office of the C. A. Smith Lumber & Manufacturing Co. at Marshfield, Oregon, at a conversation between Arno Mereen, the vice-president of the C. A. Smith Lumber & Manufacturing Company and John A. Parker, the plaintiff in this case, you three and no other persons being present, at which a contract of employment entered into by the C. A. Smith Lumber & Manufacturing Company, on the one side, and John A. Parker, the plaintiff on the other side, for services in settlement of damages sustained by Parker, was discussed?

Mr. GOSS: Objected to on the ground that it is incompetent, irrelevant, and immaterial; that it is unnecessarily leading, even for an impeaching question. that it pre-supposes matters not proved, and which are the basis of this action; that it is intended as the foundation for impeaching questions and evidence, and that

(Deposition of Catharine B. Parker.)

as such it is improper in that it does not properly identify the conversation referred to, nor comply with the statutory requirements for such a question.

A. I was present at such conversation.

Q. State what was said at that time.

Mr. GOSS: Same objection.

Q. As to my recollection, the substance was concerning the employment of Parker. Mr. Mereen admitted that he had promised him employment on account of the damages to his hand.

Q. What was said by Mr. Mereen, if anything, as to the length of time Mr. Parker was to be employed?

Mr. GOSS: Same objection.

A. I understood while the mill was running.

Q. Was there a dispute between them as to the length of time that Mr. Parker was to be employed, and if so what was said on that subject?

Mr. GOSS: Same objection, and the further objection that it calls for a conclusion of the witness, and is leading.

A. Parker said, Mr. Mereen, you promised me work as long as I lived. Mereen said, As long as there was work. Well, Parker said, As long as I wanted it.

Q. What did Mr. Mereen say to that?

A. Mereen said, As long as you wanted it.

Q. Was anything said, and if so what as to the cause of Mr. Parker's being discharged?

Mr. GOSS: Same objection.

A. On account of the law suit, of the death of his brother.

(Deposition of Catharine B. Parker.)

Q. Who stated that to be the cause?

A. Mr. Mereen stated that.

Q. Was anything said at that conversation about whether or not Mr. Parker had performed his work satisfactorily and properly?

Mr. GOSS: Same objection.

A. At different times Mr. Mereen said that everything was satisfactory with Mr. Parker from the time he started to work for the company until he was discharged. His work was entirely satisfactory.

Q. When do you intend to leave this county, Mrs. Parker?

A. Well I may be called any day. It is necessary for me to get home. I must leave the first week in October, anyway.

Q. What are your present intentions of going away from here?

A. My present intention is going away.

Q. When? A. I am liable to go any day.

Q. You are liable to go any day?

A. Yes, my business calls me home.

Mr. GOSS: I object to that as leading.

Q. Where do you intend to go when you leave here?

A. Well, I intend to call at Washington for a few days, and from there to my home at Amherst, Nova Scotia.

CROSS EXAMINED BY MR. GOSS.

Q. How many times did you see or talk with Mr. Mereen?

A. That is the first time I ever met Mr. Mereen.

Q. That is the only time you ever talked with him?

(Deposition of Catharine B. Parker.)

A. To my recollection, yes.

Q. How long did you talk with him at that time?

A. I could not tell you exactly. I think a couple of hours.

Q. And the conversation was practically all of it between Mr. Parker and Mr. Mereen, was it?

A. Yes, excepting what few words I spoke to Mr. Mereen myself, relating to the trial.

Q. How much conversation did you personally have with Mr. Mereen?

A. I could not tell you how much I had. We conversed a few words on the subject of the trial.

Q. Then practically all the conversation was between Mr. Parker and Mr. Mereen.

A. Concerning the employment and business it was. Of course, Mr. Mereen and I talked also.

Q. How much of those two hours was occupied in a discussion relative to the employment of Mr. Parker?

A. I could not tell you. The boy pleaded so hard to be allowed to go to work. He was up against hard times, and he had to go to work at something. Mr. Mereen, he said, if you will even promise me work in two months, I will try and put up some kind of a building on my land.

By Mr. STOLL, continuing direct examination with consent:

Q. With reference to the conversation that you testified to in your direct examination, who was present?

A. Mr. Mereen, Parker, and myself.

Q. Where did that conversation occur?

(Deposition of Catharine B. Parker.)

A. Right in the office where I met Mr. Mereen.

Q. At the office, what office do you mean?

A. In the Smith building, Mr. Mereen's office, I presume.

Q. And when did this conversation occur, at what time?

A. I could not swear to that.

Q. What month was it, state approximately when it was.

A. I could not tell.

Q. When did you come here?

A. It must have been on the 27th of July, I came here.

Q. How long after you came here did it occur?

A. I would not like to swear to as what time that was. I believe it must have been near the latter part of August or the first week in September. The first thing that attracted my attention was a piece in the paper about the law suit.

CROSS EXAMINATION CONTINUED BY
MR. GOSS.

Q. You say that the first thing that attracted your attention was a piece in the paper about a law suit?

A. Yes, that was going to be brought by Parker against the Smith company.

Q. About this job?

A. Concerning the settlement that he had made, and they had not fulfilled their contract or something to that effect.

(Deposition of Catharine B. Parker.)

Q. That was in the Times here, was it not. The Coos Bay Times?

A. It was in the paper they took at the house. Yes, it was the Times.

Q. Now, what, if any reason did Mr. Mereen give for not employing Mr. Parker.

A. On account of the law suit that he was bringing on account of the negligence of the company leaving some wood in the street, which caused his brother's death. He tried to collect damages and to prevent other people from the same accident.

Q. This is what Mr. Mereen gave as the reason for not employing him?

A. Through the conversation, that was what I understood.

Q. Did Mr. Parker state to Mr. Mereen that he had a position and that he could work, or was he asking Mr. Mereen for a position?

A. Yes, he asked him to be allowed to go to work.

Q. Did Mr. Parker claim to Mr. Mereen that he had a contract with Mr. Mereen, with the C. A. Smith Lumber & Manufacturing Company, whereby he was guaranteed work?

A. Yes he claimed he had.

Q. That was all he admitted, was it?

A. Yes, he promised him work.

Q. He didn't admit any contract whereby he had agreed and guaranteed to give him work, did he?

A. Yes, Mr. Mereen admitted that the C. A. Smith Lumber Company had promised him work.

(Deposition of Catharine B. Parker.)

Q. Had promised him work. Is that all he admitted?

A. That was agreed under the settlement.

Q. Did he admit that they had made a settlement, and that that was a part of the settlement whereby he guaranteed him work? Did he use the word guaranteed?

A. Well, I wouldn't swear that he used that word, but he promised him work, and that the Smith company in the settlement they made with him on account of his hand promised him that.

Q. Did Mr. Mereen say that he had promised him work at that time? At the time of the settlement he promised him work.

Q. At the time of the settlement, he promised him work? Did he say that?

A. Well, he promised him work on the contract of settlement.

Q. Did Mr. Mereen say that in your presence?

A. Yes.

Q. He said as a part of that contract that he agreed and promised to give him work?

A. Yes, he promised him work as long as the mill was running—as long as Parker wanted it—as long as the mill stood.

Q. As long as the mill stood? As long as he wanted it?

A. Yes.

Q. You say Mr. Mereen at that time admitted and said that he promised him work as long as he wanted it, and that it was part of the settlement?

(Deposition of Catharine B. Parker.)

A. That was it.

Q. Well, did he say that?

A. Yes, he promised him work as long as he wanted it, and as I understood it, it was a part of the settlement and contract.

Q. Well, was that one settlement that was brought up in that conversation some settlement that occurred at once particular time?

A. He promised him work at that settlement.

Q. Yes, but do you say that that was one settlement?

A. I don't know.

Q. Did you understand from that conversation that that settlement had been made all at once on one particular day? A. Yes sir.

Q. Oh, you did, well, I am asking whether that settlement or agreement or promise or whatever took place, all took place at once that is, that Mr. Mereen and Mr. Parker made this agreement at one time and one place, or was it the result of numerous negotiations and conversations relative to that matter?

A. All I know about it, is what I heard that day.

Q. I am trying to find out what you heard that day.

A. I told you that.

Q. Well, as a part of what you heard, I want to know if what you heard at that time was that Mr. Parker and Mr. Mereen had made a settlement at once particular day, at which time this promise of work was made, or whether it was a settlement that had been made at different times, or if they had discussed it for a considerable period of time?

(Deposition of Catharine B. Parker.)

A. That subject didn't come up.

Q. Did Mr. Parker say anything about his having signed a release or a paper, a receipt settling that matter?

A. I didn't know anything about it.

Q. Did Mr. Mereen mention anything about it?

A. No.

Q. Did Mr. Parker mention anything about any money he received in that settlement?

A. I never knew there was any money.

Q. Mr. Parker never told you he had received any money?

A. The subject never came up.

Q. And Mr. Mereen didn't mention it at that time?

A. No.

Q. You had talked this matter over with Mr. Parker before this meeting had you not?

A. No, nothing that amounted to anything.

Q. Hadn't you heard of his settlement before that time?

A. Nothing in particular. I didn't know what settlement he had made.

Q. He never wrote you or told you of the settlement? A. No.

Q. You didn't know Mr. Mereen before, did you?

A. No I never met him before.

Q. Mr. Parker asked you to go there with him did he not?

A. No. I have a daughter who is a stenographer, and wanted to get her a job, and I asked Mr. Mereen

(Deposition of Catharine B. Parker.)

while I was there if there was a chance for her to get a job. That is what I went over for.

Q. Did he go for that purpose.

A. I couldn't tell you.

Q. Was there anything said in that conversation by Mr. Parker or Mr. Mereen that showed whether or not there had been previous conversations between Mr. Parker and Mr. Mereen with reference to Mr. Parker going back to work?

A. Well, from what I could judge I wouldn't know but that was the first time that he went right to Mereen and asked him definitely. I couldn't tell you. There was nothing said at that time relating to him asking to go back to work. He may have, I don't know. It is hard to remember conversations. If I had known that I would have been called up to remember it, I would have paid more attention to it. I did not know I was going to be cross examined on an ordinary conversation.

INSTRUCTIONS.

R. B. BEAN:

Gentlemen of the Jury, This action is brought by the plaintiff against the C. A. Smith Lumber Company to recover damages for breach of an alleged contract between the plaintiff and the defendant, by the terms of which, the defendant was to give the plaintiff employment in its mill as long as he wanted it. It appears from the pleadings and the testimony that in December, 1908, plaintiff was injured while working for the defendant company, and it is claimed by him, that as a result of such injury, he made a claim to the company for compensation, and that such claim was settled and adjusted by the company paying him a certain sum of money, and agreeing to give him employment as long as he wanted it, and that thereafter, he entered into its employment in pursuance of this agreement, and continued until January, 1913, when he was discharged, and for this, he claims damages in this case.

Now, at the outset, it is important to understand that this is not an action to recover damages for the injury that the plaintiff received, as it is not the province of this court, or the jury in this case to undertake to adjust or settle that matter. It is important, however, for the plaintiff to show that there was a claim made by him to the company for compensation on account of that injury, and that that claim was settled and adjusted by the payment of a certain sum of

money, and the agreement on the part of the company, as a part of the contract of settlement that he should be employed as long as he wanted employment, and to that extent, and to that extent only, the injury he received becomes important in this case. In other words, it is only necessary for the plaintiff to show a consideration for the contract, if there was one made, upon which he relies for recovery; and the considerations for such contract, from his standpoint, is that he had a claim, and was making one against the company for compensation, and that claim was settled by this agreement. So that the first question for you to determine in the case is whether there was such a contract or not, whether the company ever agreed as a part of its settlement with the plaintiff for a claim made by him for compensation on account of his injury, that it would give him employment as long as he wanted it. If it made such a contract, or entered into such an agreement as a part of this settlement, between these people, of a claim made by the plaintiff, then it became a binding contract, and the company would be liable for a breach thereof, if it did breach it. If there was no such contract, then the plaintiff has no cause of action, and no ground of recovery in this case.

Now, as I have said, whether there was such a contract or not, is for you to determine from the testimony. You have heard all the evidence in the case, and it is the peculiar province of the jury to pass on that question. In doing so you should consider the relation of these parties, the circumstances surrounding this transaction, the written statement or receipt, or

whatever it may be, given by the plaintiff at the time of this alleged settlement, his explanation thereof, the testimony of the other parties, the probability of a company entering into such a contract, and from all that, determine whether there was such an agreement or not. If there was not, then the case ends, so far as this conclusion is concerned, and your verdict would necessarily be for the defendant. If you believe from the evidence there was such an agreement as the plaintiff claims, and the company did, as a part of his settlement with him for this alleged claim, agree to give him employment as long as he wanted it, then the next issue in the case is whether he himself breached that contract. Now, there is some evidence on behalf of the defendant tending to show that after the plaintiff had worked for the defendant for a certain time, he quit or ceased work in order to obtain higher wages, and that he made, or attempted to make arrangements with some other employes not to take his place, in order to force the company to increase his compensation. Now, if he did that, that would be a breach of his agreement, if there was one. The company agreed, according to his statement, to give him employment as long as he wanted it, and that obligated him to continue in the employment unless the cessation was due to some physical acts, I suppose, like illness or something of that kind, or by mutual consent. He might take a lay-off if the company consented to it, or it was agreeable to them, but he couldn't use that contract as a means of forcing or compelling the company to increase his wages. Whether he did that or not, it is a ques-

tion of fact, there is a dispute as to that, and that is also a question. If you find he did quit, or cease employment with the intention, or purpose of compelling the company, or trying to compel the company to increase his wages,—that is what he struck for—then, it would be a violation of this contract on his part, and would prevent his recovery in this case. If he did not, and there was a contract as he alleges, then there is no other grounds set up in answer as I understand it, to justify his discharge. There is some evidence that he was probably discharged because he had brought some action against the company, but if the company entered into a contract to give him employment as long as he wanted it, and his work was satisfactory, and the pleadings admit that it was, then they couldn't breach that contract and justify such breach on the theory that he had sued the company in some other action, and on some other claim of liability. So that the two questions, to begin with, are, first, whether there was such a contract as the plaintiff claims. Now, there is a good deal of evidence here in reference to the statement and promises of the manager or superintendent of the defendant company to give this plaintiff steady employment. If such statements were made, and the evidence shows that they were, the superintendent so states himself, that would not of itself constitute a contract, for if one of you should say to a man who is working for you, that "I will give you employment as long as you want it", it wouldn't bind you to keep him in your service always. You would have a right to discharge him at any time you wanted

to, because the contract was based on no consideration, and he had paid nothing for the promise. So, if that is all that occurred in this case, that would not amount to an agreement. In order to constitute an agreement, it must be supported by consideration, and in order to find the consideration in this case, the contract must have been a part of the settlement of the claim made by the plaintiff against the defendant for damages, or compensation on account of the injury he received while in their service, or as a result thereof.

Now, there has been something said about the notice required to be given to the company by its employes before ceasing work. As I understand that, from the testimony and the law, it is simply that in order that an employe may demand his pay, or his wages at the time he quits, he must give three days' notice, but if he quits without giving the three days' notice, he is still entitled to his compensation, but he has to wait for the regular pay day, the same as the other employes. If he wants his pay, at the time he quits, he must give three days' notice, and then the company is obliged to pay him at that time, and that is about all that amounts to, I suppose in this case.

Now, if you find there was a contract or agreement by the company supported by a sufficient consideration, that it would give the plaintiff employment as long as he wanted it, and that he didn't himself voluntarily sever that relation, then it will be necessary for you to determine the amount of damages to which he would be entitled for a breach of the contract.

Now, the measure of damages, the purpose is compensation, and the measure is such sum as would compensate him for a breach of this contract, if there was such a contract, and if it was breached by the defendant. In a case of this kind, it was the duty of the plaintiff to make whatever effort he could to obtain employment elsewhere, and the measure of his damages would be the difference between what he could earn in the mill under this contract with the defendant, if there was such a contract, and what he is able to earn outside the mill or in any other employment that he might get, if there is any difference. Now, that is a question for you to determine, if you conclude that the plaintiff is entitled to recover.

Now, the burden of proof is on the plaintiff in this case to sustain the allegations of his complaint, and show that the contract was made as he claimed it was made; by burden of proof, I mean that he must simply make out the best case, the evidence must preponderate in his favor. If you believe it is evenly balanced, then he has failed to comply with the rules of law, and the verdict should be against him, but he is not obliged to prove his case beyond a reasonable doubt.

You are the judges of all questions of fact in this case, and the credibility of all the witnesses. Every witness is presumed to speak the truth. You have heard these witnesses testify, you have noticed their appearance and manner on the witness stand, and now it is for you to determine and say what weight is to be given to their testimony, and determine where the truth lies in this case.

Mr. GOSS: May it please the Court, I wish to be allowed an exception in general, from the failure of the Court to give each instruction requested by the defendant and not given by the Court. I wish an exception for the failure of the Court to give instructions 5 and 6 as requested.

COURT: I gave the others in substance, but if you want that exception—

Mr. GOSS: I wish an exception to the failure of the Court to give each instructions requested by the defendant and not given by the court, and then there was one instruction in which you said in substance that the plaintiff had arranged to quit his work, and had endeavored to arrange with another employe not to take his job, and you went on to say, "If you find this a fact" etc. I wish to except to that instruction.

Mr. SMITH: Plaintiff has no exceptions.

Copy received August 25, 1914.

WM. T. STOLL,

Attorney for Plaintiff.

Filed September 3, 1914.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 28th day of August, 1914, there duly was filed in said Court, a Petition for Writ of Error, in words and figures as follows, to wit:

Petition for Writ of Error.

*In the District Court of the United States for the
District of Oregon.*

JOHN A. PARKER,

Plaintiff,

vs.

C. A. SMITH LUMBER AND MANUFACTURING
COMPANY, A Corporation,

Defendant.

C. A. Smith Lumber and Manufacturing Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury, and the judgement entered on the 18th day of June, 1914, comes now by John D. Goss, its attorney, and petitions said court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the

determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

JOHN D. GOSS,
Attorneys for Defendant.

Copy rec'd Aug. 25, 1914.

WM. T. STOLL,
Att'y for Pl'ff.

Filed August 28, 1914.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 28th day of August, 1914, there was duly filed in said Court, an Assignment of Errors, in words and figures as follows, to wit:

Assignment of Errors.

In the District Court of the United States in the District of Oregon.

JOHN A. PARKER,
Plaintiff,

vs.

C. A. SMITH LUMBER AND MANUFACTURING
COMPANY, A Corporation,
Defendant.

Now comes the defendant, C. A. Smith Lumber and Manufacturing Company, by its attorney John D. Goss, and says that in the proceedings and in the final judgment in the above entitled action, dated June 18, 1914, for Twenty-five Hundred Dollars damages

and costs, in favor of the plaintiff, the court erred in the following particulars, which the defendant assigns as errors, and upon which it will rely in prosecuting its writ of error herein:

I.

The court erred in overruling defendant's motion for a nonsuit at the close of plaintiff's case.

II.

The court erred in overruling defendant's motion for a continuance or adjournment because of the absence of material witnesses who were detained by an accident while on their way to the place of trial.

III.

The court erred in overruling defendant's renewal of the motion for a continuance or adjournment on the ground of the absence of important witnesses who were detained by accident, and were by accident prevented from reaching the place of trial.

IV.

The court erred in overruling defendant's motion for a directed verdict in favor of the defendant.

V.

The court erred in refusing to instruct the jury as follows: "Before you may find a verdict for the plaintiff in this case, it is necessary that you find, gentlemen of the jury, that there was a contract between the plaintiff and the defendant, whereby the defendant

agreed for a consideration, to give the plaintiff employment, as long as the plaintiff desired it”.

VI.

The court erred in refusing to instruct the jury as follows: “If you find that there was such a contract, you must also find that that contract was still in existence at the time when the defendant refused to employ the plaintiff.”

VII.

The court erred in refusing to instruct the jury as follows: “In this connection, there has been evidence introduced going to show that the plaintiff, of his own accord, quit work for the defendant, and you are instructed that if you find from the preponderance of the evidence that the plaintiff of his own accord, quit working for the defendant, whether it was for the purpose of procuring higher wages, or whatever the motive may have been, then such act on his part terminated any contract or liability on the part of the defendant to furnish the plaintiff with employment, and the discharge of the plaintiff by the defendant thereafter, or the refusal of the defendant thereafter to employ or continue to employ the plaintiff would not render the defendant liable in damages therefor. And if you find such to be the facts, your verdict should be for the defendants”.

VIII.

The court erred in refusing to instruct the jury as follows: “In determining whether or not a contract

for employment, such as the plaintiff claims herein existed, you are to be governed by the final agreement that was actually made in settlement of the claims of the plaintiff, and although the plaintiff may have been promised work by the defendant upon numerous prior occasions, such promises would be mere inducements, without consideration, and would not of themselves make a contract, nor would they by reason of having been repeatedly made during the negotiations, be for that reason alone a part of the contract of settlement."

IX.

The court erred in refusing to instruct the jury as follows: "The defendant under the pleadings herein, and under the facts as disclosed in the evidence, would not be responsible for the acts of the physician, Dr. Dix, nor for his failure to properly care for the injuries of the plaintiff, if he did so fail to care for the plaintiff, but under the relationship between the plaintiff and the defendant, it was incumbent on the defendant only to use proper care in the selection of a physician, and if they used reasonable care in selecting a physician and the physician so selected was one of good reputation and ability, the defendant's full duty was performed, and the defendant could not be held responsible for any specific acts of negligence or malpractice of which the physician might be guilty."

X.

The court erred in refusing to instruct the jury as follows: "If you find from the preponderance of the

evidence in this case, therefore, that the defendant had used due care in the selection of a physician, and that the claim of the plaintiff with regard to his injury was based upon the neglect or malpractice of the physician, then I instruct you that such a claim would not be a valid claim as against the defendant, and the settlement thereof could not be the basis of a contract or compromise between the plaintiff and the defendant, and any promise of the defendant with regard thereto made to the plaintiff would be without consideration and not binding in law, and the failure of the defendant to keep such promise, even though you find such failure, would not render the defendant liable in damages to the plaintiff herein."

XI.

The court erred in giving the jury the following instructions: "Now, there is some evidence on behalf of the defendant tending to show that after the plaintiff had worked for the defendant for a certain time, he quit or ceased work in order to obtain higher wages, and that he made, or attempted to make arrangements with some other employes not to take his place, in order to force the company to increase his compensation. Now, if he did that, that would be a breach of his agreement, if there was one. The company agreed, according to his statement, to give him employment as long as he wanted it, and that obligated him to continue in the employment unless the cessation was due to some physical acts, I suppose, like illness or something of that kind, or by mutual consent. He might take a lay-off, if the company consented to it, or it

was agreeable to them, but he couldn't use that contract as a means of forcing or compelling the company to increase his wages. Whether he did that or not, is a question of fact, there is a dispute as to that, and that also is a question.

XII.

The court erred in overruling defendant's demurrer to the complaint upon the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendant.

XIII.

The court erred in overruling defendant's demurrer to the complaint on the ground set forth in paragraph separately numbered 1st in defendant's demurrer.

XIV.

The court erred in overruling defendant's demurrer to the complaint upon the ground set forth in paragraph separately numbered 2nd in defendant's demurrer.

XV.

The court erred in overruling defendant's demurrer to the complaint upon the ground set forth in paragraph separately numbered 3rd in defendant's demurrer.

XVI.

The court erred in overruling defendant's motion for a new trial upon the grounds of absence of material witnesses.

XVII.

The court erred in overruling defendant's motion for a new trial on the ground of absence of material witnesses who were prevented by accident from attending the trial.

XVIII.

The court erred in overruling defendant's motion for a new trial upon the ground of newly discovered evidence.

WHEREFORE, defendant prays that the judgment of the district court of the United States for the district of Oregon be reversed, and that said district court be instructed to grant a new trial of said cause.

JOHN D. GOSS,
Attorney for Defendant.

Copy rec'd Aug. 25, 1914.

WM. T. STOLL,
Att'y for Pl'ff.

Filed August 28, 1914.

G. H. MARSH,
Clerk.

And afterwards, to wit, on Friday, the 28th day of August, 1914, the same being the 47th judicial day of the regular July, 1914, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

Order Allowing Writ of Error.

JOHN A. PARKER,
Plaintiff,

vs.

C. A. SMITH LUMBER AND MANUFACTURING
COMPANY, A Corporation,
Defendant.

Upon motion of John D. Goss, Esq., attorney for defendant, and upon filing a petition for a writ of error, It is ordered that the writ of error is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered, and that the amount of the bond on said writ of error be and hereby is fixed at Thirty-five Hundred Dollars (\$3,500.00).

R. S. BEAN,
Judge.

Filed August 28, 1914.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 28th day of August, 1914, there was duly filed in said Court, a Super-sedeas Bond on Writ of Error, in words and figures as follows, to wit:

Supersedeas Bond.

*In the District Court of the United States in and for
The District of Oregon.*

JOHN A. PARKER,
Plaintiff,

vs.

C. A. SMITH LUMBER AND MANUFACTURING
COMPANY, A Corporation,
Defendant.

KNOW ALL MEN BY THESE PRESENTS:
That we, C. A. Smith Lumber and Manufacturing
Company, as principal, and American Surety Company
of New York, as surety, are held and firmly bound unto
the above named John A. Parker in the sum of Thirty-
Five Hundred Dollars (\$3,500.00), to be paid to the
said John A. Parker, for the payment of which well
and truly to be made we bind ourselves, and each of
us, and each of our successors, jointly and severally,
firmly by these presents.

Sealed with our seals, and dated this 28th day of
August, in the year of our Lord, one thousand, nine
hundred, fourteen.

WHEREAS, the C. A. Smith Lumber and Manu-
facturing Company has prosecuted a writ of error to the
United States Circuit Court of Appeals for the Ninth Cir-
cuit, to review the judgment rendered in the above enti-
tled action in the district court in and for the district of

Oregon, entered June 18, 1914, for Twenty-five Hundred Dollars damages and costs in favor of the plaintiff;

NOW THEREFORE, the Condition of this Obligation is Such: That if the above named C. A. Smith Lumber and Manufacturing Company shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make this plea good, then this obligation shall be void; otherwise to be and remain in full force and virtue.

C. A. SMITH LUMBER AND MANUFACTURING
COMPANY,

By DAVID NELSON,
Resident Agent.

Signed, sealed and delivered in the presence of:

EVELYN JOHNSON,
HERBERT S. MURPHY,
as to C. A. SMITH LUMBER
& MF'G. CO.

(Seal of the C. A. Smith Lumber & Mf'g. Co.)

AMERICAN SURETY COMPANY OF NEW YORK
(Seal of the American Surety Co.)

By W. J. LYONS.

Attest: W. A. KING,
Resident Ass't. Secretary.
W. A. KING, Agent.

United States of America
District of Oregon,—ss.

On this, the 25th day of August, 1914, before me, a notary public in and for the State of Oregon, personally appeared, David Nelson, to me personally known, who, being by me duly sworn, did depose and say: That he resided in Marshfield, Oregon, that he is the Resident Agent of the C. A. Smith Lumber and Manufacturing Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal the day and year first in this my certificate written.

HERBERT S. MURPHY,

(Notarial Seal)

Notary Public for Oregon.

Approved, Aug. 28, 1914.

R. S. BEAN,

Judge.

Filed August 28, 1914.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 11th day of September, 1914, there was duly filed in said Court, a Praecipe for Transcript, in words and figures as follows, to wit:

Praeipice for Transcript.

*In the District Court of the United States in and for
The District of Oregon.*

Praeipice for Printing Record.

JOHN A. PARKER,
Plaintiff,

vs.

C. A. SMITH LUMBER & MANUFACTURING
COMPANY, A Corporation,
Defendant.

To G. H. Marsh, Clerk of the United States District
Court, District of Oregon:

You are hereby requested and directed to cause to
be printed in the record on appeal in the above entitled
case, the following papers:

1. Transcript on Removal.
2. Demurrer.
3. Stipulation as to Demurrer.
4. Order on Demurrer.
5. Opinion on Demurrer.
6. Answer.
7. Reply.
8. Judgment.
9. Verdict.
10. Motion for New Trial.
11. Affidavits, ditto.
12. Order, ditto.

13. Petition for Writ of Error.
14. Assignment of Errors.
15. Order, allowing Writ of Error.
16. Bond on Appeal.
17. Writ of Error.
18. Citation.
19. Bill of Exceptions, and Exhibit.
20. Clerk's Certificate.

You are also requested to have printed a sufficient number of copies to comply with the rules of practice of the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN D. GOSS,

Attorney for Plaintiff in Error.

Filed September 11, 1914. G. H. MARSH,
Clerk.

CLERK'S CERTIFICATE TO TRANSCRIPT.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record upon Writ of Error in the case of John A. Parker, Plaintiff and Defendant in Error, against the C. A. Smith Lumber & Manufacturing Company, a corporation, Defendant and Plaintiff in Error, in accordance with the law and the rules of this Court, and in accordance with the praecipe of the Plaintiff in Error, and that the said record is a full, true and correct transcript of the record and proceedings had in

said Court, in accordance with said praecipe, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing record is \$., and that the same has been paid by the Plaintiff in Error.

In testimony whereof I hereunto set my hand and affix the seal of said Court, at Portland, in said District, on the day of . . . , 1914.

. Clerk.

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No. 2504

**United States Circuit Court
of Appeals
for the Ninth Circuit**

C. A. Smith Lumber & Manufacturing Company, a corporation,
Plaintiff in Error,

vs.

John A. Parker,
Defendant in Error.

Brief of Plaintiff in Error.

JOHN D. GOSS, Marshfield, Oregon,
Attorney for Plaintiff in Error.

WM. T. STOLL, Marshfield, Oregon, and
ISHAM N. SMITH, Mohawk Building,
Portland, Oregon,
Attorneys for Defendant in Error.

Filed
GAZOOT PRINTERY, MARSHFIELD, OREGON

JAN 29 1915

F. D. Moulton,
Clerk.

No. 2504

**United States Circuit Court
of Appeals
for the Ninth Circuit**

C. A. Smith Lumber & Manufacturing Company, a corporation,
Plaintiff in Error,

vs.

John A. Parker,
Defendant in Error.

Brief of Plaintiff in Error.

STATEMENT OF CASE.

Defendant in error brought his action for the breach of an alleged oral contract of employment. His complaint set forth that, while in the employ of of the plaintiff in error, he was injured in his left leg which injury he attributed to the negligence of plaintiff in error; that he was treated by the company physician in a negligent, careless and unskilful manner so that he became infected with blood poi-

soning necessitating the amputation of his right hand.

The complaint further alleges that the parties hereto entered into a settlement and agreement by the terms of which defendant in error signed a release in writing, discharging plaintiff in error from all liability for a specified sum, and that by the terms of such agreement (partly written and partly oral) defendant in error was to have employment as long as he wanted it. (T. pp. 5 to 10).

A demurrer was interposed on the grounds that the complaint did not state facts sufficient to constitute a cause of action; that it was contrary to the statute of frauds, and that it was contrary to Section 713 of Lord's Oregon Laws, because it was an attempt to vary the terms of a written instrument by parol evidence. (T. p. 25).

It was stipulated between the parties to the action that for the purposes of the demurrer the written release was as follows:

“For the sole consideration of the sum of Four Hundred Ten 75-100 Dollars, this 25th day of Sept., 1909, received from C. A. Smith Lumber & Mfg. Co., I do hereby acknowledge full satisfaction and discharge of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 16th day of September, 1908, while in the employment of the above. \$410 75-100

Signed, J. A. Parker (Seal)
Witness, Arno Mereen

Marshfield, Ore.
Witness, David Nelson,
Marshfield, Ore.”

and should be taken as having been set out in the complaint (T. pp. 27-28).

The demurrer was overruled (T. p. 29) mainly on the ground that the release was a mere receipt and was not contractual in form and that parol evidence was admissible (T. pp. 30-31).

Plaintiff in error then filed its answer (T. p. 31) setting forth, among other things, the written release and alleging that the compromise and settlement therein contained was the only settlement or agreement had between the parties concerning any of the matters set forth in the complaint.

A reply was duly filed admitting that defendant in error signed the written release above set forth and denying the other allegations of the answer (T. p. 39).

A trial was duly had, resulting in a verdict for defendant in error, in the sum of \$2,500.00 (T. p. 41) and a judgment for that amount was duly entered (T. p. 42).

At the trial, the defendant in error was permitted to testify that while in the employ of the plaintiff in error he received an injury, and subsequently made a settlement with said company through Mr. Meeren, the general superintendent, by the terms of which it was agreed that the company should pay him a certain sum of money, and give him employment (a job) in its mills as long as he wanted it and that as a part of said settlement, he signed the writ-

ten release set forth above (T. p. 95).

At the close of the plaintiff's case, defendant moved for a nonsuit and a dismissal on the ground that plaintiff had failed to make out a case and setting forth the reasons therefor, which motion was overruled, to which ruling the defendant excepted, and said exception was allowed (T. pp. 96 and 97).

The trial of said action was then adjourned until the following morning, and at said time the plaintiff in error notified the court that four of its material witnesses who expected to testify at the trial had been unavoidably delayed by an accident, and by reason thereof had failed to reach Portland in time for the trial, but were expected to arrive in Portland in time for the afternoon session, and for these reasons postponement of the trial until the afternoon of said day was requested, which motion the court overruled, to which ruling exception was taken and allowed (T. p. 97).

At the close of the testimony, the plaintiff in error renewed its motion for a continuance until the arrival of three important and material witnesses who had been delayed by an accident, and prevented from reaching Portland in time to testify, which motion was overruled, and an exception taken and allowed. Both sides then rested, and the plaintiff in error requested the court to instruct the jury to find a verdict in favor of the defendant and plaintiff in error, which instruction the court refused to give, and an exception was taken and allowed (T. p. 98).

Thereafter a motion for a new trial was duly

made upon the grounds that plaintiff in error was prevented from having a fair trial by the refusal of the court to permit an adjournment from the morning until the afternoon session because of the absence of material witnesses, and on the ground of newly discovered evidence, and on the further ground of the insufficiency of the evidence to support the verdict (T. pp. 43 to 94), which motion was denied (T. p. 94).

SPECIFICATION OF ERRORS

I.

The court erred in overruling defendant's motion for a nonsuit at the close of plaintiff's case.

II.

The court erred in overruling defendant's motion for a continuance or adjournment because of the absence of material witnesses who were detained by an accident while on their way to the place of trial.

III.

The court erred in overruling defendant's renewal of the motion for a continuance or adjournment on the ground of the absence of important witnesses who were detained by accident, and were by accident prevented from reaching the place of trial.

IV.

The court erred in overruling defendant's motion for a directed verdict in favor of the defendant.

V.

The court erred in refusing to instruct the jury as follows: "Before you may find a verdict for the plaintiff in this case, it is necessary that you find,

gentlemen of the jury, that there was a contract between the plaintiff and the defendant, whereby the defendant agreed for a consideration, to give the plaintiff employment, as long as the plaintiff desired it."

VI.

The court erred in refusing to instruct the jury as follows: "If you find that there was such a contract, you must also find that that contract was still in existence at the time when the defendant refused to employ the plaintiff."

VII.

The court erred in refusing to instruct the jury as follows: "In this connection, there has been evidence introduced going to show that the plaintiff, of his own accord, quit work for the defendant, and you are instructed that if you find from the preponderance of the evidence that the plaintiff of his own accord, quit working for the defendant, whether it was for the purpose of procuring higher wages, or whatever the motive may have been, then such act on his part terminated any contracts or liability on the part of the defendant to furnish the plaintiff with employment, and the discharge of the plaintiff by the defendant thereafter, or the refusal of the defendant thereafter to employ or continue to employ the plaintiff would not render the defendant liable in damages therefor. And if you find such to be the facts, your verdict should be for the defendants."

VIII.

The court erred in refusing to instruct the jury as follows: "In determining whether or not a contract for employment, such as the plaintiff claims herein existed, you are to be governed by the final agreement that was actually made in settlement of the claims of the plaintiff, and although the plaintiff may have been promised work by the defendant upon numerous prior occasions, such promises would be mere inducements, without consideration, and would not of themselves make a contract, nor would they by reason of having been repeatedly made during the negotiations, be for that reason alone a part of the contract of settlement."

IX.

The court erred in refusing to instruct the jury as follows: "The defendant under the pleadings herein, and under the facts as disclosed in the evidence, would not be responsible for the acts of the physician, Dr. Dix, nor for his failure to properly care for the injuries of the plaintiff, if he did so fail to care for the plaintiff, but under the relationship between the plaintiff and the defendant, it was incumbent on the defendant only to use proper care in the selection of a physician, and if they used reasonable care in selecting a physician and the physician so selected was one of good reputation and ability, the defendant's full duty was performed, and the defendant could not be held responsible for any specific acts of negligence or malpractice of which the physician might be guilty."

X

The court erred in refusing to instruct the jury as follows: "If you find from the preponderance of the evidence in this case, therefore, that the defendant had used due care in the selection of a physician, and that the claim of the plaintiff with regard to his injury was based upon the neglect or malpractice of the physician, then I instruct you that such a claim would not be a valid claim as against the defendant, and the settlement thereof could not be the basis of a contract or compromise between the plaintiff and the defendant, and any compromise of the defendant with regard thereto made to the plaintiff would be without consideration and not binding in law, and the failure of the defendant to keep such promise, even though you find such failure, would not render defendant liable in damages to the plaintiff herein."

XI

The court erred in giving the jury the following instructions: "Now there is some evidence on behalf of the defendant tending to show that after the plaintiff had worked for the defendant for a certain time, he quit or ceased work in order to obtain higher wages, and that he made, or attempted to make arrangements with some other employes not to take his place, in order to force the company to increase his compensation. Now, if he did that, that would be a breach of his agreement, if there was one. The company agreed, according to his statement, to give him employment as long as he wanted it, and

that obligated him to continue in the employment unless the cessation was due to some physical acts, I suppose, like illness or something of that kind, or by mutual consent. He might take a lay-off, if the company consented to it, or it was agreeable to them, but he couldn't use that contract as a means of forcing or compelling the company to increase his wages. Whether he did that or not, is a question of fact, there is a dispute as to that, and that also is a question.

XII.

The court erred in overruling defendant's demurrer to the complaint upon the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendant.

XIII.

The court erred in overruling defendant's demurrer to the complaint on the ground set forth in paragraph separately numbered 1st in defendant's demurrer.

XIV.

The court erred in overruling defendant's demurrer to the complaint upon the ground set forth in paragraph separately numbered 2nd in defendant's demurrer.

XV.

The court erred in overruling defendant's demurrer to the complaint upon the ground set forth in paragraph separately numbered 3rd in defendant's demurrer.

XVI.

The court erred in overruling defendant's motion for a new trial upon the grounds of absence of material witnesses.

XVII.

The court erred in overruling defendant's motion for a new trial on the ground of absence of material witnesses who were prevented by accident from attending the trial.

XVIII.

The court erred in overruling defendant's motion for a new trial upon the ground of newly discovered evidence.

XIX.

The court erred in permitting the defendant in error to testify as follows:

“We will give you a job as long as the company holds together, or as long as you want it.” (T. p. 108).

“Q. Did you make this settlement?

A. We made this settlement.

Q. Did you accept that?

A. No, I didn't accept it at that time, so I said I would think it over and see. I said “How about this doctor bill; I got another doctor on it” I says to him. Well, he says “We will pay the doctor bill.” I also put up about the medicine I used, another drugstore; he said they would settle for that too.”

“Q. Now, at the time of your settlement or after

you came back, did you have any further conversation with Mereen? A. Yes sir.

Q. Talked this over with him again?

A. We talked this all over again.

Q. And do you remember the date that you signed this release that has been read?

A. Sometime in September, I think. I don't remember the date.

Q. And what were the ultimate promises, what were the promises that were made to you for the settlement, if any?

A. Well, to give me this doctor bill, hospital bill, and \$200." (T. pp. 109-110)

"Q. What was the final settlement as to employment?

A. He partly promised me the position as foreman of the Bay City Mill when they started that up.

When the time came there was another man put in the position. I told him that I thought I would be able to handle that job, but this fellow had a better pull than I had, so he got it and they put me in this trimmer job.

Q. And what statement, if any, did they make to you at the time this release was signed about giving you a job and what kind of a job?

A. Said would always give me a job and something better than common work.

Q. That was part of the whole settlement?

A. Yes sir." (T. p. 110-111).

"Q. How long did they tell you before the settlement you might have the job for?

A. As long as I wanted it." (T. p. 111).

"Court: He is asking what work you did after the date of settlement.

A. This was after the date of settlement, this work.

Q. You filled various places there after that, did you?

A. Yes sir." (T. p. 111-112)

"Q. State whether you accepted that settlement on the understanding and promises he had made you as well as the other consideration?

A. Yes sir. It was the understanding I was to keep employed." (T. p. 112).

"Q. I thought I had asked you the question as to how long, if at all, they told you this job would last, when they made the settlement.

A. Told me it would last as long as I wanted the job.

Q. Now, that I understand was a part of the promises upon which you made the settlement?

A. Yes sir." (T. p. 116).

XX

The court erred in permitting Catherine B. Parker, mother of defendant in error to testify as follows:

"Q. Were you present on August 17th or 18th, 1913, at the office of the C. A. Smith Lumber & Manufacturing Co. at Marshfield, Oregon, at a conversation between Arno Mereen, the vice-president of the C. A. Smith Lumber & Manufacturing Company and John A. Parker, the plaintiff in this case,

you three and no other persons being present, at which a contract of employment entered into by the C. A. Smith Lumber & Manufacturing Company, on the one side, and John A. Parker, the plaintiff on the other side, for services in settlement of damages sustained by Parker, was discussed?

Mr. GOSS: Objected to on the ground that it is incompetent, irrelevant, and immaterial; that it is unnecessarily leading, even for an impeaching question, that it pre-supposes matters not proved, and which are the basis of this action; that it is intended as the foundation for impeaching questions and evidence, and that as such it is improper in that it does not properly identify the conversation referred to, nor comply with the statutory requirements for such a question.

A. I was present at such conversation.

Q. State what was said at that time.

Mr. GOSS: Same objection.

Q. As to my recollection, the substance was concerning the employment of Parker. Mr. Mereen admitted that he had promised him employment on account of the damages to his hand.

Q. What was said by Mr. Mereen, if anything, as to the length of time Mr. Parker was to be employed?

Mr. GOSS: Same objection.

A. I understood while the mill was running.

Q. Was there a dispute between them as to the length of time that Mr. Parker was to be employed, and if so what was said on that subject?

Mr. GOSS: Same objection, and the further objection that it calls for a conclusion of the witness, and is leading.

A. Parker said, Mr. Mereen, you promised me work as long as I lived. Mereen said, As long as there was work. Well, Parker said, As long as I wanted it.

Q. What did Mr. Mereen say to that?

A. Mereen said, as long as you wanted it." (T. pp. 247-248).

XXI.

The court erred in instructing the jury as follows:

Now, at the outset, it is important to understand that this is not an action to recover damages for the injury that the plaintiff received, as it is not the province of this court, or the jury in this case to undertake to adjust or settle that matter. It is important, however, for the plaintiff to show that there was a claim made by him to the company for compensation on account of that injury, and that that claim was settled and adjusted by the payment of a certain sum of money, and the agreement on the part of the company, as a part of the contract of settlement that he should be employed as long as he wanted employment, and to that extent, and to that extent only, the injury he received becomes important in this case. In other words, it is only necessary for the plaintiff to show a consideration for the contract, if there was one made, upon which he relies for recovery; and the considerations for such contract, from his standpoint, is that he had a claim,

and was making one against the company for compensation, and that claim was settled by this agreement. So that the first question for you to determine in the case is whether there was such a contract or not, whether the company ever agreed as a part of its settlement with the plaintiff for a claim made by him for compensation on account of his injury, that it would give him employment as long as he wanted it. If it made such a contract, or entered into such an agreement as a part of this settlement, between these people, of a claim made by the plaintiff, then it became a binding contract, and the company would be liable for a breach thereof, if it did breach it. If there was no such contract, then the plaintiff has no cause of action, and no ground of recovery in this case.

Now, as I have said, whether there was such a contract or not, is for you to determine from the testimony. You have heard all the evidence in the case, and it is the peculiar province of the jury to pass on that question. In doing so you should consider the relation of these parties, the circumstances surrounding this transaction, the written statement or receipt, or whatever it may be, given by the plaintiff at the time of this alleged settlement, his explanation thereof, the testimony of the other parties, the probability of a company entering into such a contract, and from all that, determine whether there

was such an agreement or not (T. pp. 257 to 259).

In order to constitute an agreement, it must be supported by consideration, and in order to find the consideration in this case, the contract must have been a part of the settlement of the claim made by the plaintiff against the defendant for damages, or compensation on account of the injury he received while in their service, or as a result thereof. * * * *

Now, if you find there was a contract or agreement by the company supported by a sufficient consideration, that it would give the plaintiff employment as long as he wanted it, and that he didn't himself voluntarily sever that relation, then it will be necessary for you to determine the amount of damages to which he would be entitled for a breach of the contract (T. p. 261).

POINTS AND AUTHORITIES

The chief contention of plaintiff in error on this appeal is that the release signed by defendant in error, as follows:

“For the sole consideration of the sum of Four hundred ten and 75-100 Dollars, this 25th day of September, 1909, received from C. A. Smith Lumber & Mfg. Co. I do hereby acknowledge full satisfaction and discharge of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 16th day of December, 1908, while in the employment of the above.

\$410 75-100 (Signed) J. A. PARKER [Seal]

Witness, ARNO MEREEEN,
Address, Marshfield.
Witness, DAVID NELSON,
Address, Marshfield.

was and is a complete bar to his action. This was the principal ground of demurrer in the court below, and was the principal ground of the motion for nonsuit at the close of plaintiff's case, the motion for a directed verdict at the close of the whole case, the objections to the evidence concerning the alleged contemporaneous oral agreement to furnish employment, and was the principal ground of objection to the instructions given to the jury, and those refused.

In presenting the law on this point, therefore, it may be considered particularly with reference to specifications of error Nos. XII and XV, and incidently with reference to Nos. I, IV, VIII, XIII, and XIX.

In its opinion on demurrer the court below held (T. p. 30-31) that the release given was a **mere receipt** because not **contractual in form**, and therefore could be contradicted by parol evidence to show a contemporaneous oral agreement to furnish employment so long as he wanted it.

The release in question begins with the words: "For the **sole** consideration."

This is equivalent to a covenant or agreement on the part of the defendant in error that the consideration stated in the release is the only consideration; that there is no other or further consideration

than that stated for his releasing his claim against the company. The consideration therefore is contractual in form, and the cases cited in the opinion are not applicable. Furthermore we propose to show that even if the release had not contained the statements that the consideration named was the sole consideration, the general rule as to varying written instruments by parol evidence would still have been applicable, and that the cases cited in the court's opinion do not correctly state the law according to the great weight of authority.

Our contention that the recital in the release that the sum named therein was the sole consideration constituted an agreement is directly sustained in a Massachusetts case, where the facts were as follows:

The plaintiff had sustained injuries while in the employ of defendant, had signed a release, and afterwards instituted suit. The release recited that

“for the sole consideration of the sum of \$50 and a doctor's bill of not exceeding \$25.”

plaintiff acknowledged full satisfaction and discharged all claims in respect to the accident. At the trial plaintiff offered in evidence conversations intended to show a different agreement. The trial court excluded the evidence, and these rulings were sustained on appeal, the court saying:

“MORTON, J. We think that the rulings were right. The evidence which was offered tended to vary or contra-

dict the written agreement, and was therefore rightly excluded. The release stated that the considerations recited were the 'sole considerations'. Evidence of a consideration in addition to those contained in the release would have tended to directly contradict the express written agreement that the considerations named were the 'sole considerations.' "

Budro vs. Burgess, (Mass.)

83 N. E., 318.

In the case at bar, we think the court below overlooked the statement in the release as to the consideration named being the sole consideration, but even where the receipt or release contained no such statement, case after case holds that where the parties come to a written compromise or settlement of claims or liabilities parol evidence is not admissable to vary the terms thereof. The rule is thus stated in Cyc:

"Where parties enter into a written compromise or settlement of claims or liabilities it is not subject to be varied or contradicted in its terms or effects by parol evidence."

17 Cyc, 621 and cases cited.

The difference between a receipt and a release or compromise is clearly pointed out by the New York Court of Appeals. The document was in the following form:

“Rec’d. Brookfield, July 11th, 1849, of Wm. D. Knap, forty dollars in full for the damage done to us by the stage accident of the 13th June last.”

In its opinion, the court said:

“The instrument in question in this action is evidence of a compromise or settlement of the damages occasioned by the accident. It is not, technically, a receipt for money on account, which may be explained by parol, by showing that some particular item was not intended to be included; it was in full for damages occasioned by a particular transaction. It is, in effect, a release of the defendant from all liability occasioned by that transaction. This subject has been so elaborately discussed in various decisions that I deem it unnecessary to go fully into a consideration of the authorities. The case of *Kellog v. Richards* (14 Wend 116) is much like this; the receipt in that case was as follows: ‘Received of Richards & Sherman, S. H. Addington’s note, dated July 30, 1828, payable four months from date, for \$431.40, as a compromise for the full amount of the note;’ the amount of the note referred to was \$1629.44. The court decided that the paper was

more than a simple receipt; it was an agreement of compromise, by which the plaintiff agreed to take Addington's note for \$431.40, as a compromise for the full payment of defendant's note, and being made bona fide and without fraud, could not be contradicted by parol, while the court recognized the rule laid down in 1 Johns Cas. and numerous other authorities, that a receipt is not conclusive, but may always be inquired into. **The receipt in this case, although not expressed to be upon a compromise, clearly was so upon its face. It is, therefore, in the nature of a contract, and is so far within the general rule, that it is not liable to be varied by parol evidence.**

Judgment reversed and new trial awarded.

Coon v. Knap. 8 N. Y. 402 at 403 and 407.

In Connecticut, the Supreme Court of Errors said:

"A receipt is evidence that an obligation has been discharged; but a release is itself a discharge of it. A discharge is a fact, which cannot be explained away, as against anyone whose interests may have been affected by it. The rule that written agreements can

not be varied by parol operates in favor of those who were parties to it, whenever it was executed by the latter as the final embodiment of their agreement, and the parol evidence is offered to vary the legal effect of the terms in which it is expressed. The only purpose of such evidence can then be to give a new and unwarranted character to a past act. 4 Wigmore on Evidence, Secs. 2425, 2432, 2446."

Allen v. Ruland, 65 Atl. 138 at 140.

In a Massachusetts case the receipt was as follows:

"Amherst, January 1, 1886.

Received of F. L. Stone, for the town of Amherst, ten dollars in full of all demands for damage sustained on the highway near the house of Alden Cooley, on the evening of December 31, 1885.

(Signed) Emory A. Squires."

The court ruled that plaintiff would not be permitted to show that it was orally agreed that the release should apply only to the damages to his personal property and not to his personal injuries.

Squires v. Inhabitants of Town of Amherst, 13 N. E. 609.

In Ohio the Supreme Court held that a written instrument in the following terms:

"\$15.50. Wooster, Ohio, May 13, 1890. This is to certify that I have

this day settled with John Ely, and he has paid me all he owed me up to this date, and I have no claims against him of any kind whatsoever.

Mrs. Wm. Jackson."

was not a mere receipt, but an agreement which could not be varied by parol evidence.

Jackson v. Ely, 49 N. E. 792.

To the same effect, see the next case in the same volume.

Cassilly v. Cassilly, 49 N. E., 795.

In a Colorado case, the release is set out in full and is in the form of a receipt. The Supreme Court said:

"In so far as the evidence introduced on this issue tends to show that the release was given as a receipt for wages merely, it was incompetent, since the writing, in plain and unambiguous language, states that the \$108 was paid in full settlement of the claim against the Union Pacific Railway Company on account of the injuries complained of, and in consideration of such payment expressly releases the company from any action therefor; and oral testimony is inadmissible to contradict or vary its terms."

Denver & R. G. R. Co. v. Sullivan. 41 Pac. 501 at 504.

In another case, plaintiff sued for injuries, and de-

fendant set up a certain receipt which was in the following form:

“\$6.50. Providence, R. I., August 15, 1898. Received of I. B. Mason & Sons, six and 50-100 Dollars in full settlement for damages sustained by falling into ice pit at Canal St. John Vaughan.”

The court permitted the plaintiff to explain this receipt and to testify that when he received the money specified therein, he did not understand that it was in settlement of his claim, but was simply on account of his doctor's bill. Defendant excepted to the admission of this testimony.

The court said:

“That an ordinary receipt given on payment of a sum of money is only *prima facie* evidence of the fact recited, and may, therefore, be explained or contradicted by parol, is doubtless the law. *Goodwin v. Goodwin*, 59 N. H. 550. Such a paper does not constitute a contract or agreement in writing between the parties, but is only the written acknowledgment of the payment of money, without containing any affirmative obligation upon either party to it; in other words, it is a mere admission of a fact in writing. 2 Beach, Cont. §383. *Ryan v. Ward*, 48 N. Y. 208. 8 Am. Rep. 539. *Krutz v.*

Craig, 53 Ind. 574. 2 Bouv. Law Dict. tit. 'Receipt.' Raymond v. Roberts, 2 Aikens, 204, 16 Am. Dec. 698. See also, Smith v. Ballou, 1 R. I. 496. Where, however, an agreement is embodied in the receipt, then, in so far as the receipt contains an agreement, it can not be varied or controlled by parol evidence, and hence is not open to explanation, unless for uncertainty or ambiguity in its terms; in other words it stands on the same footing in this regard as ordinary agreements or contracts in writing. Henry v. Henry, 11 Ind. 236, 71 Am. Dec. 354; Stapleton v. King, 33 Iowa, 28, 11 Am. Rep. 109. In the case at bar the written paper put in evidence by the defendants is not only a receipt acknowledging the payment of money, but it also contains an agreement that the money is received in full settlement for the damages sustained by the plaintiff in falling into the ice pit. It therefore falls clearly within the rule above referred to, and it was not competent for the plaintiff to testify that the settlement only included a part of his claim against the defendants. * * * * *

The receipt in the case at bar is clearly, in effect, a release of the defend-

ants from all liability occasioned by the accident in question, and, no claim being made that it was obtained by fraud, the plaintiff is bound thereby."

Vaughan v. Mason, et al, 50 Atl. 390 at pp. 391 and 392.

In another case the Court of Civil Appeals of Texas said:

"Plaintiff offered to testify that at the time he executed the release he did not understand that he was injured other than as specified in said release, and none other was considered by the parties, and was not intended to be included in said release. Upon objection this testimony was not admitted, and the action of the court in excluding the same is assigned as error. There was no error in excluding this evidence. There was no ambiguity about the contents of the release."

Moore v Missouri, K. & T. Ry. Co. of Texas, 69 S. W. 997, at page 1000.

In another Texas case the form of the action was substantially the same as in the case at bar, the plaintiff declaring on an agreement partly oral and partly embraced in a writing, the written portion being a release. Plaintiff alleged that the real consideration was not the release. The trial court excluded the testimony as to the oral agreement and on appeal their ruling was sustained, the ap-

pellate court saying:

“Appellant’s only assignment of error embraced in his brief questions the correctness of this action of the trial court; appellant’s contention being that the proposed evidence was admissible in order to show the true consideration for said contract, and to show the independent stipulation making the contract entire. We do not think the rule which admits testimony of the character offered applies where such testimony would have the effect to destroy the purpose and effect of the written contract of the parties. The purpose and effect of the writing under consideration were to disavow and disclaim any right, title, or interest in or to the property in controversy on the part of the appellant and to acknowledge title thereto in appellee, and to lease such property from appellee to appellant for a definite period of time, which had expired when this suit was instituted. The effect of the testimony offered was to continue for all time in appellant the right to the possession and use of the property admitted by him in the writing to be owned by appellee, and tenancy of which he acknowledged under appellee, which, in our

opinion would contradict the terms of the written instrument and destroy its purpose and effect.

“The authorities cited and discussed by appellant in his brief do not, in our opinion, apply to a case like the present. We think it appears from the record that the evidence, exclusion of which is complained of by appellant, comes within the well established rule which prohibits the use of contemporaneous parol testimony to vary or contradict a written instrument.”

Teague v. Ricks, 100 S. W. 794 at 795.

It will be remembered that in the case at bar the release is, for the purposes of the demurrer, made a part of the complaint (T. p 27).

In a case decided by the United States Circuit Court of Appeals for the Fifth Circuit the release was as follows:

“Form 715. Release. 5-90-5M

“Whereas, on and prior to August 14th, 1891, one Chas. Dearborn was an employe of the St. Louis & San Francisco R’y Company, and, as such employe, was engaged as engineer on engine 228, on the Texas Division, and whereas, said Chas. Dearborn received certain injuries, as follows, to wit: he was running engine No. 228 when main rod strap bolts broke, and thinking that

engine was going over, he jumped off, breaking his right arm above the elbow, for which said injuries said Chas. Dearborn does not make any claim of any class or character against said railway company, and admits that his injuries are not the result of any negligence on the part of said railway company: Now therefore, in consideration of the sum of one dollar (\$1.00), in hand paid, and the further consideration of re-employment by said St. Louis & San Francisco Railway for such time only as may be satisfactory to said company, said railway company is hereby released from any and all claims that I, said Chas. Dearborn, claimant herein, ever had against said company, up to date, and especially released from any and all claims arising out of injuries specially set forth herein.

Given under my hand and seal this 26th day of Sept., 1891. (Signed) Chas. Dearborn. (Seal)."

The trial court admitted evidence which is set forth in the opinion to the effect that when the plaintiff signed the release they agreed to pay him for lost time, pay his hotel and hospital bills, etc.

On appeal, the Circuit Court of Appeals reversed the case, the court saying in part:

"In our view of this case, the only

assignments of error necessary for us to consider are those which involve the ruling of the court below in reference to the release pleaded and read in evidence by the defendant (now plaintiff in error). The assignments of error referred to are, in substance, the overruling defendant's demurrer to plaintiff's replication to the plea of release; the overruling defendant's motion to exclude from the jury the plaintiff's testimony to the effect that the defendant agreed to pay plaintiff's hotel and hospital bills, and his lost time, etc., as the consideration for the release; and the refusal of the court to instruct the jury, as requested by the defendant, that the written release precluded any recovery by the plaintiff; and that they should find for the defendant. The general principle is that contracts or agreements between parties, reduced to writing, deliberately executed or accepted, not bearing any evidence of incompleteness, are presumed to comprise the whole meaning, purposes and contracts of the parties. Parol evidence is not admissible to add to, alter, or vary the terms of such a contract."

After quoting from plaintiff's testimony, the court

goes on to say:

“He thus seeks to alter, vary or add to his written agreement by parol evidence. This he cannot do. There is a distinction between a representation of an existing fact which is untrue, and a promise to do, or not to do, something in the future. In order to avoid a contract, the former must be relied on. The plaintiff does not pretend that there was any representation of an existing fact which was untrue, but the claim is that there was a promise to do something in the future. *Bigham v. Bigham*, *supra*. Our opinion is that the release was an effectual bar to this action, and that the trial court erred in its several rulings in reference thereto. Reversed and remanded.”

St. Louis & S. F. Ry. Co. v. Dearborn. 60 Fed. Rep. 886 at 881 and 882.

In another Circuit Court of Appeals case, (Sixth Circuit) the release is set forth in full and recites the consideration as **having been paid**. The court said:

“It is, no doubt, well-settled law that so much of such an instrument as is in the nature of an acknowledgment of receipt, being the mere statement of a fact, and not containing terms of agreement, may, as a general rule, be

explained and contradicted by parol evidence. 1 Greenl. Ev. Sec. 305; 2 Whart. Ev. Sec. 1064; Weed v. Snow, 3 McLean, 265. But this instrument contained more than a mere receipt. It stated that, in consideration thereof, the owners of the Manitowoc released and forever discharged the Cayuga and her owners from all claims whatsoever on account of the injury resulting from the collision, except the claim, made by the owners for the loss of the use of the barge Manitowoc. It was a release under seal, of all claims resulting from the collision except the one saved, namely, that for the value of the use of the vessel during the time she was disabled. This agreement for release was in the nature of a contract, and could no more be disputed or controlled by parol evidence than any other instrument in writing witnessing an agreement of parties. 2 Whart. Ev. Sec. 1063; Wood v. Young, 5 Wend. 620; Stearns v. Tappin, 5 Duer, 294; Pratt v. Castle, 91 Mich. 484, 52 N. W. 52; Cummings v. Baars, 36 Minn. 353, 31 N. W. 449; Sherbourne v. Goodwin, 44 N. H. 276."

The Cayuga, 59 Fed., 483, at 485.

In a case decided by the Supreme Court of the

United States, four receipts are set forth in full all in substantially the same form, one of which is as follows:

“U. S. Circuit Court.

Sarah C. Shirley & als v. St'r Richmond.
Received, New Orleans, July 3, 1876,
from Mr. A. Chiapella, security on
bond given by libellants in the above
cause to respond to the cross libel filed
by N. S. Green & al, claimants of the
st'r Richmond, the sum of eleven hun-
dred and sixty-six 66-100 dollars, in full
satisfaction of a decree rendered
against him in above entitled cause,
and I hereby subrogate him to the
rights of N. S. Green and owners of
the st'r Richmond. (Signed) Kennard,
Howe & Prentiss, Att'ys for Owners
of Richmond.”

Evidence to show another and different oral agree-
ment was offered, and on objection the court re-
fused to hear the evidence, to which ruling the
plaintiff excepted. The Supreme Court sustained
the ruling of the trial court, and held that such evi-
dence was inadmissible, saying that the offer of the
plaintiff in error to prove by parol another condition
of the contract was rightly rejected because such
parol evidence necessarily offered to contradict the
written agreement of the parties; **that the payment
and receipt of the money in pursuance of the
agreement amounted to a release, so that there**

was a valuable consideration to sustain the contract.

Boffinger v. Tuyes, 120 U. S., 198.

The contention that the court below was in error in overruling the demurrer on the ground that the release was not contractual in form, is sustained in a Missouri case. The writing was as follows:

“I hereby agree to accept, and do accept, of the Wabash Railroad Company, the sum of five thousand eight hundred dollars, as evidenced by my signature to the receipt annexed, in full satisfaction, release and discharge of all claims for damages that I now have, or may hereafter have against said company on account of personal injuries received by me in wreck of train No. 20, near Warrenton, Mo., also loss of time for services * * * on the lines of the Wabash railroad, on or about the 6th day of September, A. D. 1904, and also in full of all claims whatsoever for loss or damage to personal property in consequence of said accident. And it is further expressly agreed that in case suit has been instituted for said claim said suit shall be dismissed at the cost of no suit and said company forever discharged from all liability growing out of said injuries. \$5,800.00. Received Jan. 5th, 1905, from the Wabash

Railroad Company, the sum of five thousand eight hundred dollars, in full for the above settlement as per agreement recited. Ella Tate (Seal) J. T. Tate (Seal)."

Plaintiff contended that the statement of the consideration was not contractual and that the real consideration could be shown by parol evidence. The court said:

"Where the statement of the consideration appears in a written deed or contract as a mere recital of a fact, it is open to explanation by parol evidence; but, where the language employed in the written instrument bespeaks the intention of the parties to treat the consideration as a contractual subject, the party afterward complaining no more is entitled to alter or vary such stipulation by parol evidence than he would be to change any of the other essential elements of the contract. It matters not that the expressed consideration be money or some other species of property, the real intention of the parties to be collected from the four corners of the written contract is the test to be applied. The mere recital in the instrument of the amount of the money consideration or an acknowledgment of the receipt of

the money does not of itself evidence an intention to treat the amount of the consideration as one of the binding stipulations of the contract; but where, in addition to such recital or acknowledgment, terms are inserted which show a purpose to dispose, in the instrument, of the question of the amount and nature of the consideration, the subject must be held to have been regarded by the parties themselves as contractual."

Tate v. Wabash Ry. Co.,
110 S. W. 622 at 623.

That the court below erred in overruling the demurrer in the case at bar is still further sustained in a Georgia case, where the receipt or release was as follows:

"\$1,750. Atlanta, Ga., July 18, 1905. Received of the Georgia Railroad (under which style the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company as lessees, operate the Georgia Railroad & Banking Company), through W. L. Kendrick, its agent, the sum of seventeen hundred and fifty dollars, (\$1,750); and in consideration of said sum I hereby acquit, discharge and release the said Georgia Railroad & Banking Company, the Louisville & Nashville

Railroad Company, and the Atlantic Coast Line Railroad Company for all claims for damages of every kind, nature, and character, growing out of or incident to personal injuries sustained by me while a passenger of said Georgia Railroad on its Washington Branch between the stations of Barnett and Sharon, in the derailment of the train known as No. 43, June 10, 1905."

Defendant demurred to a complaint which alleged an additional oral agreement and on appeal the demurrer was sustained.

Smith v. Georgia Railroad & Banking Co.,
62 S. E., 673 at p. 674.

It was contended in another Georgia case that the release given was a mere receipt which could be explained by parol evidence, the writing being set forth in full in the opinion. The trial court permitted plaintiff to testify concerning an alleged oral agreement to pay additional consideration to that expressed in the writing. On appeal the court held that to permit such evidence was reversible error.

Penn. Casualty Co. v. Thompson,
61 S. E. 829.

In the opinion overruling the demurrer (T. p. 31) the court rests its decision on three cases therein cited, namely, Pennsylvania Company v. Dolan, 32 N. E. 802, Allen v. Tacoma Mill Company, 51 Pac., 372, and Holmboe v. Morgan, 138 Pac. 1084. In view of the many authorities cited in this brief

which are exactly in point, especially those to which we shall refer presently, it seems unnecessary to endeavor to distinguish any of the three cases cited in the court's opinion except that of *Pennsylvania Company v. Dolan*. The other two cases are not authorities for the proposition to which they are cited. In the case of *Allen v. Tacoma Mill Company*, which was for the conversion of logs, the court held the document a mere receipt and rested its decision upon and quoted from a Massachusetts case (*Stackpole v. Arnold*, 11 Mass. 27) as follows:

“For a receipt is not evidence of a contract, but of payment; and it has always been permitted to show that something short of the actual terms of the receipt was intended, it being conclusive only as to the amount of money paid, and not even for that, provided any **mistake** can be shown to have taken place in the adjustment between the parties.”

Probably the doctrine laid down in this Massachusetts case is sound, especially where mistake or fraud is pleaded and proved, but we maintain that it is not applicable to the case at bar, even if we disregard the statement in the release given by defendant in error that the consideration recited is the sole consideration.

The case of *Holmboe v. Morgan* is clearly not in point. No question of a receipt or release is involved.

All that was held was that where a contract is partly written and partly oral, the oral portion, **unless within the statute of frauds**, may be shown by parol. In support of its decision the court cites (p. 1085) the cases of *American Contract Co. v. Bullen Bridge Co.*, 29 Ore. 549, 46 Pac. 138, and *Williams v. Mt. Hood Ry. & Power Co.*, 57 Ore. 251, 110 Pac. 490, 111 Pac. 17; both of which lay down the rule that when the terms of a contract are reduced to writing, parol evidence is not admissible to vary its terms, except where the writing is incomplete or ambiguous. These decisions, as well as all other Oregon decisions, but follow the Oregon statute which is substantially the same as the common law rule, and is as follows:

“When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence

of the circumstances under which the agreement was made, or to which it relates, as defined in section 717, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term "agreement" includes deeds and wills as well as contracts between parties. (L. 1862; D. §682; H. §692; B. & C. §704.)"

Lord's Oregon Laws, §713.

It is on the foregoing section that the third ground of demurrer in the case at bar is based. (Specification of Error No. XX.)

This brings us to the remaining case cited by the court below in the opinion on demurrer, namely, *Pennsylvania Co. v. Dolan*, 32 N. E. 802, an Indiana case which unquestionably is at variance with the great weight of authority in that it holds that the consideration recited in a written **release** as having been paid, may be varied by parol evidence to show another and different consideration. That is the Indiana doctrine, as is indicated by the cases cited in the court's opinion, the language of which is as follows:

"The doctrine that all the oral negotiations are merged in the written contract and that the terms of the latter can not be varied by proof of a contemporaneous verbal agreement, does not apply. Even if the release were treated as the foundation of the action, the

true consideration might be inquired into. This may be done even where the consideration expressed varies from, or is contradicted by the true one. *Pickett v. Green*, 120 Ind. 584, 22 N. E., Rep., 737; *Levering v. Shockey*, 100 Ind. 558; *MacMahon v. Stewart* 23 Ind. 590; *Thompson v. Thompson*; 9 Ind. 323; *Rockhill v. Spraggs*, Id. 30."

It will be noted that all the cases cited are Indiana cases, and we believe the doctrine enunciated is limited to that state.

But the court goes on to say:

"The exception to this rule is where the parties have undertaken to specify the consideration in the writing, and where such consideration is contractual in its nature. In that case parol evidence to vary the terms of the agreement will not be admitted."

In the case at the bar the consideration was specified in the writing and was **contractual** in its nature, in that the parties **agreed that it was the sole consideration.**

So that even under the Indiana rule the release given by defendant was a complete bar to his action.

This contention is sustained in a much more recent Indiana case, where the following release:

"The Indianapolis Union Railway Company to John J. Houlihan, Dr.: To amount in compromise of claim for

injuries received by him on August 8, 1895, at the Vandalia crossing of the Belt Railroad by his being struck by an engine of said company on said Belt Railroad while he was attempting to cross the track in the discharge of his duties as a telegraph operator in the employ of said company; said amount being in addition to all fees and charges payable to physicians and St. Vincent's Hospital for services and care rendered to said Houlihan on account of such injuries, which amount of fees and charges said company, as a part of said compromise, agrees to pay; and in consideration of the said agreement to pay said fees and charges and the amount herein mentioned as a cash payment to him, the said Houlihan, by his signature to the receipt below, does release and discharge the said company from any and all claims, demands, actions, and rights of action that he now has or may hereafter have by reason of said injuries or accident. \$25.00. Approved. Baker & Daniel, Att'ys. Sept. 25, 1895.

Received of the Indianapolis Union Railway Company twenty-five dollars as payment in full of the above account, in consideration of which I release and

discharge said company as above specified. John J. Houlihan.

Approved. A. A. Zion, Superintendent. James M. McCrea, President."

was introduced in evidence and the Supreme Court of Indiana held that it could not be varied in its terms, the court saying in conclusion, after struggling valiantly to distinguish the case of Pennsylvania R. R. Co. v. Dolan:

"The consideration on each side was the mutual covenants of the other. In the absence of any issue of fraud or mutual mistake, **appellee should not have been permitted to deny that the consideration for his release was correctly stated in the contract.**"

Indianapolis Union Railway Co. v. Houlihan, 60 N. E. 943.

The Indiana rule seems to be that where the consideration in a release is recited as **having been paid** another consideration may be shown by parol, while if it recites a consideration **to be paid**, parol evidence is admissible, a distinction without a difference so far as the underlying principle of law is concerned.

On the general proposition that a **release**, even where the consideration clause is a mere acknowledgement of the receipt of a certain sum of money, cannot be varied or contradicted by parol evidence, we submit the following cases:

Clark v. Mallory (Illinois) 56 N. E., 1099

VanBokkelyn v. Taylor (N. Y.) 62 N. Y. 105, where the release was as follows:

“We, the undersigned creditors of George F. Taylor, of Brooklyn, State of New York, for value received, and in consideration of one dollar by him in hand paid to each of us, the receipt whereof is hereby acknowledged, do release him from all indebtedness due by him to us, either on book account, note of hand, or in any other way, bearing date prior to January 1st, 1868.”

Harvey v. Denver & R. G. R. Co. (Colo) 99 Pac. 31.

Norfolk & W. Ry. Co. v. Mundy (Va.) 66 S. E. 61.

Leddy v. Barney (Mass.) 2 N. E. 107.

The cases to which we shall next direct the attention of the court are squarely in point, each being an attempt to prove an oral contract **to furnish employment** where the release contained no such provision. In each case the consideration clause was in the form of a receipt or acknowledgment that the money given in consideration of the release had been paid.

In a North Carolina case, the plaintiff alleged that the defendant agreed to pay him in discharge of its liability, “**\$6000.00 in money, and retain him in the services of the company in some**

position or place not requiring much bodily activity, and one adapted to plaintiff in his condition, as it should turn out to be, during his life"; that he was paid the said \$6000.00, and continued in the defendant's employ until discharged. Defendant admitted that it agreed to pay the \$6000.00 that it did pay the same, but denied the additional agreement to furnish employment, and alleged that the plaintiff executed his release, acquittance and discharge of liability on account of said injuries.

As in the case at bar, the consideration clause in the release was not in the form of an agreement, but was signed by the plaintiff only, and was in the following form:

“\$6,000. Know all men by these presents that I, A. B. White, of the city of Greensboro, N. C., for and in consideration of the sum of six thousand dollars, to me in hand paid, the receipt whereof is hereby acknowledged, do hereby release the Richmond & Danville Railroad Company, and the North Carolina Railroad Company, its lessor, from all claims upon them for damages received by me by a collision which occurred near the Yadkin river, about the 19th of August, 1884, and covenant with them, that I will not sue them, or either of them, for damages received in said collision. That by this

instrument I hereby release said company from any further liability or care of me on account of said accident. Witness my hand and seal, this 26th day of October, 1885. A. B. White. (Seal.)”

White v. Richmond & D. R. Co., 15 S. E., 197, at p. 198.

The court held that the evidence as to the contract to furnish employment was not admissible.

The Supreme Court of Kansas held in a case where the consideration clause of the writing was in the form of a receipt, and as in the case at bar, an attempt was made to show **an additional oral agreement to furnish employment.**

“The position taken by plaintiff in his reply to answer is that one comprehensive agreement of settlement was made; that one of the subjects covered was the matter of future employment; that the part of the contract relating to future employment should have been included in the written evidence of the agreement, but that it was omitted. There is no correspondence in the record between plaintiff and defendant’s agent prior to January 10, 1899, the date of settlement, relating to the employment of the plaintiff by the defendant. Hence, any promise upon that subject inducing the contract was

necessarily oral, as the reply indicates. None of the subsequent correspondence on the part of the railway company can be construed into acknowledgment or recognition whatever of any previous obligation to re-employ the plaintiff. Therefore the only support of the fourteenth and fifteenth findings of fact is verbal testimony, and such is the theory of the reply.

The plaintiff's pleadings and the findings of the jury therefore present the simple case of an attempt to supplement a written contract by parol evidence, so as to extend its terms to cover a matter which the instrument itself excludes. Since the jury found that the defendant at all times denied any obligation to pay the plaintiff anything for his injuries, the instrument signed was not a mere unilateral acknowledgment or admission, but was a contract of settlement and release by way of compromise, which, if valid at all, became binding when the defendant paid to the plaintiff the sum of money stipulated for. The contract is full and complete in its terms, unambiguous, reasonable, and plain. The plaintiff signed it understandingly and voluntarily. It is therefore the meas-

ure of the rights of the parties to it. Milich v. Armour, 60 Kan. 229, 56 Pac. 1; Ehlsam v. Brown, 64 Kan. 466, 67 Pac. 867; Thisler v. Mackey, 65 Kan. 464. 70 Pac. 334; Rogers v. Perrault, 41 Kan. 385, 21 Pac. 287; Willard v. Ostrander, 46 Kan. 591, 26 Pac. 1017; A. T. & S. F. Ry. Co. v. Truskett, 66 Kan. 72 Pac. 562."

Atchison. T. & S. F. Ry. Co. v. Van Ordstrand 73 Pac. 113 at 116.

In a Texas case, an alleged **oral agreement to furnish employment** was pleaded as the consideration for a release in the form of a receipt, in the following form:

"In consideration of the sum of Fifteen (\$15.00) dollars (and the assumption of Dr. Gaudlin's bill) the receipt of which is hereby acknowledged, I, B. F. Smith do hereby release the Rapid Transit Railway Company from any and all liabilities growing out of a certain accident and injuries sustained by my wife on or about June 8th, 1902, said injuries having been received by reason of a collision between two of the cars of the said Rapid Transit Railway Company, upon Commerce Street, Dallas, Texas, upon one of which cars my wife was a passenger. This release includes all injuries sustained whether

temporary or permanent, whether developed or hereafter to be developed. It is understood that this release shall be in no wise considered as an admission of liability on the part of said Rapid Transit Railway Company, and I hereby release for myself and said wife the said Rapid Transit Railway Company from any and all claims of liability whatever. (Signed) B. F. Smith."

On appeal the Supreme Court said:

"The release hereinbefore quoted is a contract definite in all its terms. It distinctly specifies the consideration for the release, and the testimony shows that it was paid. It clearly releases the defendant company from all further liability for the injuries which resulted to the wife of the plaintiff as a consequence of the accident. Being a written contract, containing the recital of the payment of one sum, and the promise to pay another as a consideration, it was not subject to be varied or contradicted by parol evidence. It was not susceptible of having imported into it by parol testimony that there was an additional agreement that the company was to give the plaintiff employment as a motorman, and that upon its failure to do so the release should

be void.”

Rapid Transit Ry. Co. v. Smith, 86 S. W.
322, and 323.

In a Rhode Island case the plaintiff executed a release and afterward brought suit alleging that the company had also agreed in addition to the consideration recited in the release, **to continue him in its employment.** The court said:

“The general rule that oral evidence will not be received to add to or vary the terms of a written contract applies to releases as well as other written instruments. If parties have put their contract into writing, the written instrument is to be regarded as the only evidence of the contract as finally concluded. Oral evidence of what was said or done during the negotiations will not be admitted either to contradict what is written or to supply terms with respect to which the writing is silent. The purpose of the rule is to enable parties to make their written contracts the only evidence of their undertakings, and to protect themselves against the hazard of uncertain oral testimony in respect to their engagements. A moment’s consideration will serve to show how highly important the rule is to the security of the contracting parties, if, indeed, it

is not indispensable. The only exception to the rule is when the written contract is incomplete, and it is apparent from an inspection of the instrument that it does not embrace the entire contract. In such a case oral testimony may be resorted to to supplement, but not to vary or contradict what is written. *Naumberg v. Young*, 44 N. J. Law, 331; *Thomas v. Scutt* 127 N. Y. 133, 27 N. E. 961. The release in the case at bar does not appear on inspection to be incomplete. On the contrary, it is a formal instrument under seal, evidently designed to be a complete discharge of the defendant company from all liability to the plaintiff for the injury he had received. **It begins by acknowledging the receipt of \$900** from the defendant in full settlement and discharge of any debt, demand, claim and suit, and of all debts, demands, claims and suits of whatever nature, which the plaintiff has against the defendant, and particularly in full settlement and discharge of any claim, demand, or suit which the plaintiff at the time of the release had against the defendant, either in law or equity, growing out of or arising from the injury or injuries sustained by the plain-

tiff on the day of the accident on High Street, in Providence; and goes on to release and discharge the defendant from all present and future liability to the plaintiff for the injury or injuries sustained, and agrees that the release may be pleaded in bar to any suit at law or in equity which may be brought by reason of such injury or injuries. The purpose to discharge the defendant from all liability subsequent to the release and the consideration paid for the extinguishment of liability could scarcely be more clearly expressed. In the face of so full and comprehensive a release the plaintiff cannot be permitted to urge that the defendant agreed, in addition to the \$900 expressed as the consideration of the release, to give him employment, and pay him a sufficient amount of wages each week to support him and his family as he and they had been supported previously to his receipt of the injury, so long as he should live and be willing to remain in the employment of the company. *White v. Railroad Co.*, 110 N. C. 456. 15 S. E. 197. To do so would be to permit the plaintiff by oral testimony to add to the terms of a written instrument, which is apparently complete in itself, a mat-

ter concerning which the instrument is silent, and that, too, when in legal contemplation, the release is to be regarded as the only evidence of the contract of the parties as finally concluded. **The plea setting up the release in bar of the action is sustained, and the demurrer to it overruled.**

Myron v. Union R. Co. 32 Atl. 165.

A recent Maine case is strikingly similar to the one at bar, even to the testimony, which is quoted at considerable length in the opinion. The cause of action was identical, namely, for the breach of an alleged oral contract **to furnish the plaintiff employment "so long as he could work."** While in defendant's employ he had sustained the loss of his right foot. No action was brought for his injuries, but he executed the following release:

"In consideration of the sum of one thousand dollars (\$1,000) to me in hand paid, the receipt whereof I herewith acknowledge, I, John Chaplin, of Topsham, Maine, for myself, my heirs and assigns, do hereby release Amos F. Gerald, E. J. Lawrence, A. B. Page, S. A. Nye, Henry M. Soule and Cyrus W. Davis, associates, and also the Portland and Brunswick Street Railway, from any claim by me of any name or nature in the past or at the present time, or that may arise in the

future, by reason of the accident occurring on the line of the Portland & Brunswick Street Railway during the summer of 1902, at or near Mallett's gulley, so called, in Freeport, Maine, in which accident I sustained the loss of my right foot; and in consideration of the above payment, Amos F. Gerald, for the associates, Cyrus W. Davis, Treasurer Portland & Brunswick Street Railway, and John Chaplin for myself, my heirs and assigns, agree together by our signatures herewith affixed that the above settlement shall be final and conclusive. Made in duplicate, this ninth day of February, A. D. 1903.

A. F. Gerald. [Seal]

Portland & Brunswick Street R'y,

By Cyrus W. Davis. [Seal]

John Chaplin. [Seal]"

In his action plaintiff alleged that at the time he executed the release, the defendants:

"promised him that if he would sign a certain acknowledgment of satisfaction, and accept the sum of \$1000 in money, they on their part would pay him \$1000 and give him employment at \$65 per month as long as he could work."

He further testified that he re-entered defendants' employ and continued until he was wrongfully

dismissed.

The testimony quoted in the decision, with the necessary change of names, would, in all its details, pass for the testimony in the case at bar. No exception had been taken, however, to the admission of the testimony, and the case came up on a motion for a new trial because the verdict was contrary to the weight of evidence. The motion was granted and in its decision the court said:

“The general rule that oral evidence will not be received to add to or vary the terms of a written contract applies, we think, to such a release as the one above quoted. The only exception to the rule is found where from an inspection of the instrument it appears to be incomplete and not to embrace the entire contract. In such case resort may be had to oral testimony to supplement, but not to vary or contradict the written instrument.

The instrument in the case at bar is not incomplete, but comprehensive, and appears to embrace an entire contract between the parties. It is not merely a receipt for money, which may be explained by parol. On the contrary, it is a formal release witnessing in plain and explicit terms an agreement discharging the defendants from all liability to the plaintiff for the injury he had received and ‘which was to be final

and conclusive.' The testimony of the plaintiff that the defendants agreed, in addition to the \$1,000, expressed as a consideration for the release, to furnish him employment as long as he should be able to work, is, we think, inconsistent with and tends to vary and contradict the written instrument. *Myron v. Union Railroad Co.*, 19 R. I. 125, 32 Atl. 165; *White v. Richmond & D. R. Co.*, 110 N. C. 456, 15 S. E. 197; *Horn v. Miller*, 142 Pa. 557, 21 Atl. 994; *The Cayuga*, 59 Fed. 483, 8 C. C. A. 188; *James v. Bligh*, 11 Allen (Mass.) 4; *Goss v. Ellison*, 136 Mass. 503.

The above authorities are cited not merely in support of the general rule, but as showing its applicability to the case at bar."

Chaplin v. Gerald, 71 Atl. 712.

Another case exactly in point, and a very recent one (June, 1913) was decided by the Supreme Court of Arkansas. The plaintiff, an employe of defendant had received injuries, and negotiations for settlement had culminated in a written release, as follows:

"Whereas, I, William Williams, of the county of Pulaski, state of Arkansas, was injured, at or near Argenta, Ark., on or about the 4th day of April, 1910, on a line of railway owned or

operated by the Chicago, Rock Island & Pacific Railway Company, while working for said company under circumstances which I claim rendered such company liable in damages, although such liability is denied by such railway company, and the undersigned being desirous to compromise, adjust and settle the entire matter, now, therefore, in consideration of the sum of three hundred dollars (\$300,00) to me this day paid by the Chicago, Rock Island & Pacific Railway Company, in behalf of itself and other companies whose lines are owned or operated by it, I do hereby compromise said claim and do release and forever discharge the said Chicago, Rock Island & Pacific Railway Company, and all companies whose lines are leased or operated by it, their agents and employes, from any and all liability from all claims for all injuries, including those that may hereafter develop, as well as those now apparent, and also do release and discharge them of all suits, actions, causes of actions and claims for injuries and damages, which I have or might have arising out of the injuries above referred to, either to my person or property, and do hereby acknowledge full satisfaction of all such

liability and causes of action. I further represent and covenant that at the time of receiving said payment and signing and sealing this release I am of lawful age, and legally competent to execute it, and that before signing and sealing it I have fully informed myself of its contents and executed it with full knowledge thereof."

Williams v. Chicago R. I. & P. Ry.
Co., 158 S. W. 967.

Subsequently, he was taken back into defendant's employ and later discharged and refused further employment. He then brought suit on an alleged verbal contract alleging that as a **part of the consideration for the release defendant was to furnish him employment during his lifetime.**

The court carefully reviewed the authorities, including the Indiana case of *Pennsylvania Co. vs. Dolan*, *supra*, and held that:

"The contract before us contains more than a mere recital or acknowledgment of the amount to be paid as the consideration. The writing shows upon its face that it was a compromise of the differences between the parties concerning the subject matter stated and that the amount to be paid was a part of the contract. **That part of the contract constituted more than a mere receipt for the money paid, and it**

would be inconsistent with the express terms of the writing itself to prove an additional or further consideration."

Williams v. Chicago R. I & Pac. Ry. Co.,
158 S. W. 967 at 969.

In speaking of the case of Pennsylvania v. Dolan, *supra*, the court said that it was:

"The only case brought to our attention holding to the contrary."

and that even in that case, the court recognized the general rule that:

"Where the parties have undertaken to specify the consideration in the writing and where such consideration is contractual in its nature, parol testimony of additional agreement is inadmissible."

The court further held that it was error to charge the jury, in substance, that if the defendant, at the time of the settlement:

"verbally agreed, in consideration of said release, to give the plaintiff permanent and steady employment at such work as plaintiff could perform in his then condition for the term of his natural life, at a stated compensation."
(p. 968).

The applicability of this ruling to the case at bar is in connection with our specifications of error No. VIII and No. XXI. As bearing on this point see

also the case of Rapid Transit Ry. Co. vs. Smith, 86 S. W. 322 at 323, where the court said:

“Upon the question of the release the trial court charged the jury as follows: ‘If you find and believe from the evidence before you that, at the time the written release was signed by the plaintiff, the defendant company, by and through its agent, C. F. Freeman, promised the plaintiff that he should be re-employed by the defendant company, you will find for the plaintiff.’ We think the charge of the court was erroneous, and that the error requires a reversal of the judgment.”

Rapid Transit Ry. Co. v. Smith, 86 S. W., 322 at 323.

That this case of Pennsylvania Co. v. Dolan is not regarded as an authority is further shown in an opinion by the Supreme Court of Kansas in a case which was also on all fours with the case at bar, being an action to recover for the breach of an alleged oral contract of employment. Defendant answered, denying that there was any independent oral agreement and alleged that all the agreements and negotiations of the parties were reduced to writing and signed by them; that the consideration had been paid and the defendant released from all liability. The release is set forth in full in the opinion, the essential part being as follows:

“Now, therefore, this agreement wit-

nesseth that in consideration of the sum of three hundred dollars (\$300.00) paid by the said Armour Packing Company, the said Annie Miltz does hereby release and discharge the said Armour packing Company from any and all liability," etc.

On appeal, the court said, after a careful review of the authorities:

"The plaintiff strongly relies on *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, and *Harrington v. Railway Co.*, 60 Mo. 228, but the writings upon which the decisions are based in those cases are quite dissimilar from that in the case at bar, and **neither of them, as will be seen, was decided by courts of last resort**; and even in those cases the exception to the rule is recognized, that where the parties have undertaken to specify the consideration in the writing, and such consideration is contractual in its nature, parol evidence of other or different considerations will not be admitted. **The writing in the present case is so clearly contractual in character as to hardly admit of discussion, and under the authorities, parol proof of other understandings than those embodied in the writing can not be received.**"

Milich v. Armour Packing Co.,
56 Pac. 1.

Still another case exactly in point was decided by the Supreme Court of Iowa. Plaintiff sued on an oral contract **to furnish him employment as long as he lived.** Defendant pleaded a written release. Although the release is not set forth it appears from the statement of facts that in consideration of \$400.00 plaintiff had released defendant from all liability. The appellate court held that the trial court rightly excluded the testimony and directed a verdict for defendant.

Jessup v. Chicago & N. W. Ry. Co., 68 N. W. 673.

The release in the case at bar goes further than those in any of the last mentioned cases and distinctly provides that there is no other consideration than that expressed in the writing. Obviously an attempt to show another and different consideration directly contradicts the written agreement. The demurrer of the plaintiff in error should have been sustained; the defendant in error should not have been permitted to testify that there was an oral agreement to employ him; the court should have allowed the motion for a nonsuit at the close of the plaintiff's case; the court should have directed a verdict for defendant (plaintiff in error) at the close of the whole case; the court should have instructed the jury to disregard the evidence as to the alleged agreement to furnish employment. For any and all these errors, the judgment should be reversed.

In distinguishing between a **receipt** and a **release** upon a compromise or settlement of unliquidated demands, the Supreme Court of Minnesota said:

“A ‘receipt’ may be a mere acknowledgment of payment of a certain sum of money, or it may also contain a contract; and, of course, the rule is very familiar that, so far as it goes only to acknowledge payment, it may be it contradicted by parol evidence that the payment was not made, but in so far as it contains a contract, it stands upon the footing of other written contracts, and can not be varied or contradicted by parol. Sencer-box v. McGrade, 6 Minn. 484, (Gil. 334); Wyckoff vs. Irvine; Id. 496 (Gil. 344); Morris v. St. Paul & C. Ry. Co., 21 Minn. 91.”

* * * * *

“But where it contains anything in the nature of an agreement or stipulation upon a **compromise or settlement** of disputed claims or unliquidated damages, that the one party shall receive and accept from the other a certain sum in acquittance and discharge of such claim, it is in the nature of a contract, and can not be varied or contradicted by parol, but is conclusive upon the parties, in

the absence of fraud or mistake.”

Cummings v. Baars, 31 N. W. 449 at 550.

Another matter to which we wish to direct the court's attention arises under Specifications of Error Nos. II and III, relating to the refusal of the trial court to grant an adjournment or continuance of a few hours because of the absence of material witnesses who were unavoidably detained by an accident while on their way to the place of trial by reason of which the plaintiff in error was deprived of their testimony (T. p. 221, p. 245). The three witnesses were Mathison, Rourke, and Dresser. They started in ample time to reach Portland in time for the trial but, as appears from their affidavits, (T. pp. 61, 63, 64) while going through the “canyon” their automobile broke down, and although they used every means in their power, they were unable to reach Roseburg in time to catch the train for Portland. After missing the train they tried to reach Portland in an automobile, but it again broke down, and they were compelled to wait at Drain for the next train and finally reached Portland at 4:35 P. M. (T. p. 64).

“If a material witness starts in due time to attend a trial, and is delayed purely by accident, and is prevented thereby from reaching the place of trial until the trial has been concluded, and the party for whom the witness expected to testify is unsuccessful, and was not in fault in going to trial with-

out the witness, we think that ordinarily such party is entitled to a new trial."

Smith v. State Ins. Co. (Iowa)

12 N. W. 542, at 543.

Cited in Cyc 29, p. 861, in support of the following text:

"The unexpected absence * * *
of a witness * * * from the trial
where delay to secure his attendance
was refused, may be ground for a new
trial, if the movant was not guilty of
negligence in failing to secure his at-
tendance."

The following cases are also cited in support of the foregoing:

Smith v. Ledgerwood Mfg. Co.. 60 N. Y.

App Div. 467, 69 N. Y. Suppl. 975.

Watterson v. Watterson 1 Mead (Tenn) 1.

Cliver v. Stephens, 3 U. C. Q. B. O. S. 21.

"So also the absence from the trial
of a non-resident witness, who has
been expected, on reasonable grounds,
to attend, has been held sufficient
cause for allowing a new trial."

29 Cyc, 861, citing

Cahill v. Hilton, 31 Hun. (N. Y.) 114, af-
firmed in 96 N. Y. 675.

In conclusion, we respectfully submit that it is wholly unnecessary and would serve no useful purpose to cite further cases to support the proposition

for which we are here contending, namely, that a release or compromise is on a different footing than a mere receipt and that in the case of *Pennsylvania Co. v. Dolan* and in the decision on demurrer of the lower court in this case, this underlying principle of law was lost sight of. Under these two decisions if the release had contained a **promise to pay** the consideration immediately after the signing instead of a recital that it **had been paid**, at the time of signing, it would be held to be **contractual in form**. This is a difference in **form** only and not in substance, and rests wholly upon a misapplication of legal principles. In closing we can do no better than to quote the language of the Supreme Court of Mississippi where this subject is most ably discussed.

“A release can not be contradicted or explained by proof, because it extinguishes a pre-existing right. But no receipt can have the effect of destroying per se any subsisting right. It is only evidence of a fact. The payment of the money discharges or extinguishes the debt. A receipt for the payment does not pay the debt. It is only evidence that it has been paid. Not so of a written release. It is not only evidence of

the extinguishment, but is the extinguishment itself."

Baum v. Lynn, 18 So. 428 at 430.

Compromises and settlements have always been especially favored by the law and are set aside with great reluctance. In the case at bar the release shows on its face that it was a complete compromise and settlement; that its purpose was to extinguish the liability of the one party for any and all claims of the other party for the consideration of the sum named, for that consideration and that only. There is no ambiguity or uncertainty in the writing; there is no element of mistake, fraud, duress, or the like. To hold that one may attempt to show by parol another and entirely different agreement merely because he actually received this **sole consideration** instead of receiving a **promise to pay** it is to violate one of the basic principles of the law and opens wide the door to fraud and perjury.

The judgment should be reversed.

Respectfully submitted,

JOHN D. GOSS,

Attorney for Plaintiff
in Error.

Herbert S. Murphy,
Of Counsel.



IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

C. A. SMITH LUMBER AND MANUFACTURING
COMPANY, a corporation,

Plaintiff in Error,

vs.

JOHN A. PARKER,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

In the month of December, 1908, John A. Parker (Defendant in Error) was in the employment of C. A. Smith Lumber & Manufacturing Company (Plaintiff in Error) at its sawmill, called the C. A. Smith mill, near Marshfield, Coos County, Oregon. While in the course of his employment he received an injury in his left leg which he attributed to the carelessness and negligence of the defendant.

While employed, the Plaintiff in Error deducted from his wages one dollar per month for medical and hospital charges and furnished him a physician and

surgeon. Parker claimed that such physician treated him for his injury in a careless and unskillful manner, as a result of which injury and treatment Parker's right hand was necessarily amputated on February 6, 1909.

By reason of these matters, Parker claimed to have a cause of action against Plaintiff in Error for the loss of his hand, the humiliation of being a cripple resulting therefrom, for pain and suffering incident thereto, and for loss of time.

About May, 1909, the company, through C. A. Smith (president) and Mr. Mareen (general superintendent), began negotiations with Parker for a settlement of his claim. Before any sum of money was agreed upon, Mareen stated (Tr. 108):

“At last he says he would give me half-time; that was the best he could do, and he says ‘We will give you a job.’ Well, I says, probably the company will break up, something like that, and I won’t have no job; well, he says, ‘We will give you a job as long as the company holds together or as long as you want it.’ That is just about the words he used.”

In addition, the company agreed to pay the doctor's bill and the bills for medicines at another drug-store.

At Tr. 108, Parker says:

“So, **I went to work** in the meantime, if I remember right, and I worked a little over a month on the trimmer, helper; I was on the big trimmer at that time; they had no air at that time, so I went as a helper. I worked about a month or a little over and took an attack of appendicitis.”

He was operated on for appendicitis, and thereafter, and under date of September 25, 1909 (Tr. p. 127), the release was signed. Parker continued in the employment of the company until his wrongful discharge, on January 31, 1913, and was earning the sum of \$3.00 per day.

Parker's services were satisfactory to defendant, and at all times he was, and is, capable of rendering service for the defendant as timekeeper, or looking after its store, or measuring its lumber, or operating the trimmer built so that he could run it with one hand, and was, and is, capable of earning the sum above specified. On January 31, 1913, the Plaintiff in Error unlawfully and fraudulently and without cause discharged Parker, and ever since refused, and still refuses, to reinstate him. At that time Parker was thirty-one years of age, had an expectancy of thirty-nine years, and had no other means of earning a livelihood save and except by laboring, and by reason of his crippled condition he could not procure employment elsewhere.

By reason of the facts above set forth, Parker instituted action against the Plaintiff in Error for \$30,000.00 (Tr., pp. 5-10). In due course a demurrer (Tr., pp. 25-26) was filed to the complaint alleging the above facts, and the parties agreed that the writing which Parker executed is, in words and figures, as follows:

“(Tr., pp. 27-28.) For the sole consideration of the sum of Four Hundred Ten 75-100 Dollars, this 25th day of September, 1909, received from C. A. Smith Lumber & Manufacturing Company, I do hereby acknowledge full satisfaction and discharge of all claims accrued or to accrue in respect to all injuries and injurious

results directly or indirectly arising or to arise from an accident sustained by me on or about the 16th day of December, 1908, while in the employment of the above.

\$410 75-100. (Signed) JOHN A. PARKER,

Witness: ARNOLD MEREEEN,
Marshfield, Oregon.

Witness: DAVID NELSON,
Marshfield, Oregon."

And that such document should be considered in argument of the demurrer the same as if set forth in the complaint.

After argument the demurrer was overruled, and thereafter the defendant answered (Tr., pp. 31-39), alleging inter alia that the consideration stated in payment of release was the only consideration for the settlement of the controversy, and denying the agreement for employment claimed by Parker.

The reply (Tr., pp. 39-40) denied the new matter of the answer.

At the trial a verdict (Tr., p. 41) in favor of Parker and against the Plaintiff in Error for \$2,500.00 was given. Whereupon (Tr., pp. 42-43) judgment was duly entered.

Thereafter a motion for a new trial was made, the grounds of which are stated at (Tr., p. 44).

In the record (Tr., pp. 45-93) are set forth certain affidavits, to-wit:

Of John D. Gross (Tr., pp. 45-48);

A. L. Butts (Tr., pp. 48-51);

R. P. Herrington (Tr., pp. 51-52);

L. S. O'Connor (Tr., p. 52);

Wm. C. Hayden (Tr., p. 53);
 Alfred Johnson (Tr., p. 54);
 Chas. Dennison (Tr., p. 55);
 J. P. Malony (Tr., pp. 56-57);
 Fred Moore (Tr., p. 58);
 Walter M. Richardson (Tr., pp. 58-59);
 Bernt Matheson (Tr., pp. 59-61);
 George Rourke (Tr., pp. 61-63);
 F. H. Dresser (Tr., pp. 63-65);
 Wm. T. Stoll (Tr., pp. 66-69);
 John D. Goss (Tr., pp. 69-71);
 Exhibit A thereof (Tr., pp. 72-73);
 Wm. T. Stoll (Tr., pp. 73-75);
 A. L. Butts (Tr., pp. 75-77);
 Isham N. Smith (Tr., pp. 78-93).

None of these affidavits are embodied within any bill of exceptions, nor are they certified, identified or in any way shown to be all or the sole and only affidavits in the case, nor is there any certificate or bill of exceptions certifying that they were used on the motion for a new trial or otherwise.

In the brief, appellant has specified twenty-one assignments of errors, which we will discuss under the heading which Plaintiff in Error has discussed them.

Upon this appeal, the Defendant in Error will rely upon the following

POINTS AND AUTHORITIES

Point I.

That affidavits (Tr., pp. 45-94) are no part of this appeal, because of the absence of any certificate from any person identifying them or certifying that they are the sole or only affidavits used on motion for a new trial or that they were so used.

In the absence of such showing, the affidavits should be stricken from the record.

L. O. L., Sec. 169 (Cases).

State v. Kline, 50 Ore. 426. (Syllabus, Points 2, 10, 12 and 13.) (Opinion proper, pages 430, 433, 434 and 435.)

Myer et al. v. M. & T. Imp. Co., 85 Fed. 874.

Point II.

Statute of Frauds—Oral Testimony.

In Oregon it is settled that

“Though the terms of a writing cannot be varied by parol evidence, yet where a contract is not required by the Statute of Frauds to be in writing, the rule is not violated by admitting evidence of parts of the contract not contained in the writing.”

Holmboe v. Morgan, 69 Ore. 395. (Syllabus, Point 2.) (Opinion, page 400.)

An agreement for work and labor is not within the Statute of Frauds.

L. O. L., 804, 805, 806.

Parol evidence thereof was clearly admissible.

Holmboe v. Morgan, 69 Ore. 395, *supra*.

Pennsylvania Co. v. Dolan, 6 Ind. App. 109;
51 Am. State, 289; 32 N. E., 802.

Cox v. B. & O. S.-W. R. Co., 50 L. R. A. N. S.
453.

Barghoorn v. Moore, 6 Ida. 531 (57 Pac. 265).

White v. Merrill, 32 Ill. 511.

Allen v. Tacoma Mill Co., 18 Wash. 216 (51
Pac. 372).

Rader v. McElvane, 21 Ore. 56 (Point 2).

Looney v. Rankin, 15 Ore. 617 (619).

Lewis v. 1st Nat. Bank, 46 Ore. 182 (192, 193).

Moore v. Rice, 36 Neb. 212 (54 N. W. 308).

Warner v. T. & P. R. Co., 164 U. S. 416 (418);
(Book 41 L. 495).

Hobbs v. Brush Elec. Co. (Mich.), 42 N. W.
965.

Fire Ins. Co. v. Wickham, 141 U. S. 564.

Point III.

The contract to give Parker employment was suf-

ficiently definite, certain and binding to sustain this action.

Pierce v. Tenn. Coal, Iron & Ry. Co., 173 U. S. 1 (Book 43 L. 591).

And in the following state decisions, cases of like import have been sustained whenever and wherever presented:

Mich.—Hobbs v. Brush Elec. Co., 42 N. W. 965.

Ind.—Pa. Co. v. Dolan, 51 Am. State, 289.

Ill.—Gourley v. West Chicago St. R. Co., 96 Ill. App. 68.

Minn.—Smith v. St. Pete R. Co., 60 Minn. 330.

Mo.—Boggs v. Pac. Steam Laundry Co., 171 Mo. 282.

Mo.—Forbs v. St. Louis, etc. R. Co., 167 Mo. App. 661.

N. Y.—Usher v. N. Y. Cent. etc. R. Co., 76 N. Y. App. Div. 42; 179 N. Y. 544.

Texas—E. Line Ry. Co. v. Scott, 72 Tex. 70.

Texas—Midland R. Co. v. Sullivan, 20 Tex. Civ. App. 50.

Texas—Carroll v. Missouri R. Co., 30 Tex. Civ. App. 1.

W. Va.—Rhoades v. Chesapeake R. Co., 49 W. Va. 495.

Point IV.

Motion for New Trial.

Among the grounds of motion for a new trial (Tr., p. 44) are:

1. "That defendant was prevented from having a fair trial by the failure of its witnesses to appear and the refusal of the Court to grant further time therefor.

2. "By accident and surprise, as follows:

(a) That defendant and defendant's attorneys were surprised by the refusal of plaintiff and plaintiff's attorneys to allow the postponement of the said trial until after the hearing of the ~~preceding~~ *preceding* case as had theretofore been agreed upon.

(b) By the breaking down of the automobile in which witnesses Dresser, Matheson and Rourke were coming to said trial, which prevented their arriving in time therefor as they otherwise would have done.

3. "On account of newly discovered evidence as motion sets forth in the affidavits hereto annexed and hereby made a part hereof."

L. O. L. 174 provides, relative to new trials:

"For What Cause Granted. A former judgment may be set aside and a new trial granted on motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

1. * * * *

2. * * * *

3. Accident or surprise which ordinary prudence could not have guarded against.

4. Newly discovered evidence material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial."

In order to grant a new trial for newly discovered evidence, it must appear:

1. That the evidence is such as would probably change the result.

2. That it was discovered since the trial.

3. That it could not have been discovered before the trial by ordinary diligence.

4. It must be material and not merely impeaching nor merely cumulative.

Territory v. Latshaw, 1 Ore. 147. (Deady, J.)

Lander v. Mills, 3 Ore. 40.

State v. Gardner, 33 Ore. 149.

State v. Majors, 36 Ore. 38 (Point 8, Syllabus).

State v. Hill, 39 Ore. 90 (94, 95, 96).

L. O. L. 700, defining cumulative evidence.

Hanley v. Life Ins. Co. of America, 69 Mo. 380 (383).

Town of Manson v. Ware, 19 N. W. 275 (276).

Point V.

Where admissions of a party are given at the trial, other admissions of the same character as to the same point are cumulative.

Hines v. Driver, 100 Ind. 315.

Twine v. Kilgore, 3 Okla. 640.

Winne v. Newman, 75 Va. 811.

Manson v. Ware, 63 Ia. 346.

Hawkins v. Kermode, 85 Ga. 116.

Kruger v. City of Merrill, 27 N. W. 837.

Thisler v. Miller, 36 Pa. 1060 (Kans.).

Point VI.

Though newly discovered evidence is material, not cumulative, and not merely impeaching, **and there is no proof that it could not have been discovered before by the exercise of due diligence, a new trial will not be granted.**

People v. Priori, 58 N. E. 668 (Point 8).

29 Cyc. 873, 874.

Point VII.

Where a person relied upon the promise of a witness to attend and failed to have him subpoenaed, the witness' absence is no ground for a new trial.

Roach v. Colburn, 76 Mo. 653.

Rogers v. Hughes, 1 Cal. 429 (433).

Twine v. Kilgore, 39 Pac. 388 (389).

Eiche v. Taylor, 17 Minn. 172. (Sick; impossible to be present.)

Mortimer v. Dirks, 107 Pac. 184 (186) (Wash).

Quaghana v. Jersey City, 71 Atl. 43.

Point VIII.

The oral contract made in June having been executed, it was competent to prove it, and under the issues to submit the case to the jury.

Mobile & M. R. Co. v. Jurey, 111 U. S. 584 (597); (Book 28 L., 527, especially 530).

P. C. Co. v. Yukon I. T. Co., 155 Fed. 29 (Point 7, discussed page 37), (9 C. C. A., per Hunt, J.).

ARGUMENT.

The Defendant in Error moves to strike from the transcript all the affidavits on pages 45-93, inclusive, upon the following grounds:

1. There is no certificate in the record

(a). Identifying these affidavits as having been used in the court below;

(b) Stating that they are the only affidavits so used;

(c) Certifying that the court used them in any manner.

2. The said affidavits are not embodied or embraced within any bill of exceptions.

It is "Horn-book" law that affidavits or matters used must be certified and identified as all and the only affidavits used at the hearing of the matter concerning which they are proposed. In addition, they must be settled in a bill of exceptions.

Under the authorities cited at Point 1, further argument is unnecessary. These affidavits should be stricken.

But if this motion is overruled, then, on the merits of the motion for a new trial on the first three causes set forth therein (Tr., p. 43) we state there is nothing in the record to show that the witnesses could give any new evidence which was discovered after the trial, nor that the witnesses were subpoenaed to attend the trial, nor that any diligence was used to discover the witnesses Johnson, Herrington, Molony, Dennison, Moore, Richardson and Hayden before the trial, nor that the Plaintiff in Error used any diligence to procure the attendance of Dresser, Matheson and Rourke.

These cases were set by Isham N. Smith (of counsel for Defendant in Error) and immediately upon such setting and on, to-wit: April 20, 1914, he wrote William T. Stoll, and on April 21, 1914, wrote John D. Goss, letters set forth at Tr., p. 79-80, 80-81, to which John D. Goss, attorney for Plaintiff in Error, replied (Tr., p. 82) as follows:

“Littlefield & Smith, Portland, Oregon.

Re Aho and Parker Cases.

Gentlemen: Your letter of April 21st giving us the dates of the various cases in which we are both interested in Portland, is at hand, and so far as present indications show, these dates of trial will be very satisfactory.

I have spoken to Mr. Stoll regarding the same and he also appears to be satisfied, so that you merit the thanks of both of us for whatever you have done to bring about this result.

I take it that any arrangement or stipulation that I may make with Mr. Stoll will be entirely satisfactory to you with regard to any of these cases.

Again thanking you for your continued courtesy in these and other matters, I remain

Very truly yours,

JOHN D. GOSS.”

The case was called for trial June 17, 1914.

Plaintiff in Error was notified of this date by letter dated April 21, 1914 (Tr., pp. 80-81), and on April 24, 1914 (Tr., p. 82) acknowledged receipt of such letter.

It therefore had from April 24, 1914, to June 17, 1914, within which to procure its witnesses. It failed

to do so. Such failure was not attributable to any fraud or other deceitful act of Parker or his attorneys. This certainly is not diligence.

In addition, at the trial the testimony of alleged contradictory statements by Parker to other witnesses was given, and the absent witnesses, as well as the newly discovered witnesses, would only be cumulative.

The Court did not err in either refusing the continuance or overruling the motion for a new trial on the first three grounds specified.

See authorities of respondent under Points 1, 4, 5 and 6.

This disposes of Errors II and III, discussed at pages 64 and 65 of the brief of Plaintiff in Error.

THE RELEASE.

Plaintiff in Error has misconceived the basis of this action.

This is an action upon an executed parol agreement. The agreement to settle the claims of Parker against the company was made in May, 1909, and Parker was put to work. The release involved is dated September 25, 1909, at which time Parker had returned from the hospital where he was operated upon for appendicitis, and signed the release and resumed his work.

The chronology, then, of the events out of which this case arises, is as follows:

1. Parker was injured December 16, 1908 (Tr., p. 105).
2. The injuries, with consequent treatment, re-

sulting in blood poisoning, necessitating the amputation of his hand.

3. In May, 1909, he talked with Mr. Smith (president) and Mr. Mareen (general superintendent) about a settlement and going back to work (Tr., pp. 107-108).

4. It was agreed by Mareen that "we will give you a job as long as the company holds together or as long as you want it." (Tr., p. 108.)

* * * * *

"No, I didn't accept it at that time, so I said I would think it over and see. I said 'How about this doctor bill; I got another doctor on it,' I says to him. Well, he says, 'We will pay the doctor bill.' I also put up about the medicine I used, another drugstore; he said they would settle for that, too. So I went to work; I went to work in the meantime, if I remember right, and I worked a little over a month on the trimmer, helper. * * I worked about a month or a little over and took an attack of appendicitis."

5. It took about three months for him to recover from the appendicitis (Tr., p. 109). On his return, they put him back to work.

(Parker, Tr., p. 109): "I came back and on my return they put me in as foreman taking machinery out of the Bay City Mill, and I filled the position until the mill was ready to work, that is run the yard, kind of straw-boss, and I went on as timekeeper, and filled that position until they started up the mill, then I went and filled the position as trimmer man there for about three years."

After Parker came back from the hospital (Tr., p. 109) the matter of the conclusion of the settlement

was talked again with Mareen, and the release, dated September 25, 1909, was signed.

6. At pages 110, 111, Parker says, *inter alia*:

Q. What was the final settlement as to employment?

A. He partly promised me the position as foreman of the Bay City Mill when they started that up. When the time came there was another man put in the position. I told him that I thought I would be able to handle that job, but this fellow had a better pull than I had, so he got it and they put me in this trimmer job.

Q. And what statement if any did they make to you at the time this release was signed about giving you a job and what kind of a job?

A. Said would always give me a job and something better than common work.

(Tr., p. 111):

Q. That was part of the whole settlement?

A. Yes, sir.

Q. How long did you work for them?

A. Altogether?

Q. Yes.

A. I worked about six or seven weeks.

Q. I mean after you got hurt; after you made this settlement how long did you work for them?

A. I worked for them until after my brother got killed, after I brought this trial. I forget now the date.

Q. How long did they tell you before the settlement you might have the job for?

A. As long as I wanted it.

Q. Now, after you started work there, what different positions did you fill?

A. Well, first I went on as helper in the trimmer box; then I took appendicitis and came back and went on as foreman, then as timekeeper and from that to trimmerman.

COURT: Talking of working before or after the settlement?

A. After the settlement.

COURT: You had appendicitis before the settlement?

A. Yes, before the settlement.

COURT: He is asking what work you did after the date of settlement.

A. This was after the date of settlement, this work.

Q. (Tr., p. 112). You filled various places there after that, did you?

A. Yes, sir.

Q. What wages did they pay you?

A. Excuse me a minute. I was helper on the trimmer before my operation for appendicitis.

COURT: That was before the settlement?

A. That was before the settlement. We had talked the thing up before that.

COURT: But you didn't have the settlement until after you came back from the—

A. Appendicitis.

Q. State whether you accepted that settlement

on the understanding and promises he had made you as well as the other consideration?

A. Yes, sir. It was the understanding I was to keep employed.

From examination of the following witnesses, at the following pages, it was conclusively shown:

(a) The settlement was talked of and practically agreed upon about May, 1909.

Parker, Tr., pp. 105, 106, 108, 109, 110, 111, 112, 116, 125, 127.

(b) The statements as to his having a job were made to him before the release was signed, at the time the release was signed, and after the release was signed; and he actually had a job conditioned upon the settlement as stated by him **before the release was signed, was given a job at the time the release was signed, and kept on after the release was signed.**

Parker, Tr., pp. 132, 133, 134, 135.

7. At the time Parker signed the release, he asked them why they did not have the agreement for employment in writing, and was told as follows (Tr., p. 129):

“A. Well, at the time I had that settlement, he told me then that— I asked him why he didn’t put that in writing, and he says these blanks are already made out, etc. He says will be no trouble about any settlement we have.

(Tr., p. 135.) Q. And then after this settlement, you went to work, did you?

A. Yes, sir.

Q. You called his (Mareen’s) attention, you say, to the fact that there wasn’t— about the job wasn’t in the written form there at all?

A. I called his attention to it at the time, yes.

Q. What did he say about that?

A. Well, he says these here are made up in form like, and the company has this kept on record; "in regard to your being kept to work, that will be all right"; he says "you will always be kept employed."

Q. "You will always be kept employed," and after that you went to work, did you, right away?

A. Yes, sir.

8. After Parker had worked at different jobs, he was placed on the trimmer table, which was adjusted so he could handle it with one hand.

Parker, Tr., 112, 113.

9. Parker was discharged in 1913, for the following reason:

Parker had a brother who was killed at Marshfield, Oregon, and Parker was appointed administrator of his estate. As such, he brought action to recover for his brother's death.

The company never told him that he would be discharged for that reason, but when he left to attend the trial, his place was filled and he was never reinstated.

Parker, Tr., pp. 113, 114, 115.

Mrs. Parker, Tr., p. 248.

Mareen, Tr., pp. 184, 185, 186, 187.

10. Parker's ability to work and render satisfactory service is admitted. (Tr., p. 188):

Q. And do it well, satisfactorily. Earn his money, give you value received for his money, couldn't he?

Mr. Goss: That is all admitted in the pleadings.

11. It is admitted that at all times there has been work for the company that Parker could do.

Witness Mareen (Tr., p. 187):

Q. And there is lots of work there he is able to do, and could do?

A. Same now as then.

Q. Same now as then?

A. Yes, sir.

Q. And when he called you up and wanted to go back to work, there was work that he could do, wasn't there?

A. The mill wasn't running at that time, I don't think.

Q. Now, will you kindly answer my question. Wasn't there work there he could do at that time?

A. Not at that mill. Yes, would be work there he could do.

12. After Parker was discharged, in January, 1913, he tried to get the company to take him back to work, which they refused to do.

Witness Mareen, Tr., p. 188.

Witness Catharine B. Parker, Tr., pp. 250, 251.

13. In inducing Parker to settle upon the representations as stated by him, the defendant acted through Mr. Mareen, its superintendent, who acted personally, and also through John F. Bain, foreman in its employment.

Mr. Bain states:

(a) Before the settlement he was approached by Mareen on the subject and talked with Parker.

(Tr., pp. 156, 157.) Later on, Mareen told Bain (Tr., p. 158):

“It was the middle of the week or later, when he spoke to me, and I, of course, being interested in the case, asked whether or not he had made a settlement. He said to me that he had agreed with Jack for a settlement. He also told me that he had agreed to pay Jack’s doctor bill, give him some money, put him to work, and that I was to find Jack something to do that he could do. Asked me at different times what there was in the mill I could put him at. I explained three different positions that I thought we could use Jack at to very good advantage, and then we talked the matter over again.”

Q. What was said about the length of time that this job was to last?

A. Talking the matter over again, he told me that we were to put Jack to work, and that he was to keep him working. He had promised him a job, and I asked how long, how I could figure, whether we was to keep a job for Jack open at all times, or whether he was to draw a salary; didn’t state it possibly in those words, but my intention was to find whether he was drawing salary whether working or not. He impressed on my mind in so many words that Jack was to have a job with him as long as Jack wanted to work. Finally on—I think at any rate the first day of June, either the first or second of June, 1907—(Sic. meaning 1909)—Jack went to work under my instructions, came back and applied for work. I put him in the trimmer cage as helper,” etc.

Witness states that Parker was to have a job as long as he wanted it. (Tr., p. 160.)

Mareen was greatly pleased with the settlement. (Tr., p. 160.)

Witness continues (Tr., pp. 162, 163):

Q. Altogether. Now, this conversation that you had with Mr. Mareen was in June, was it?

A. I am quite sure it was in June.

Q. How do you fix it as being in June?

A. There were other things that occurred about that time of the year that brings to my mind it was about June.

Q. And that was the only conversation you had—was at that time, was it, with Mr. Mareen?

A. Oh, no.

Q. Well, what was the other one?

A. In regard to this particular case?

Q. Yes. That is what I mean, of course, in regard to this Parker case, of course.

A. Yes.

Q. That was the only one you had? You fix that as when Parker first went back to work, was it?

A. When he first went to work after his accident.

Q. Yes, that is what I am getting at. Before he had gone to work, Mr. Mareen spoke about it to you, or was it after he had gone to work?

A. Spoke to me before and after he had gone to work.

Q. Spoke to you first just before he went to work?

A. Yes, sir.

Q. Then how long after he went to work, when he spoke to you about it?

A. I can't state the exact length of time, but different times when he was around the work.

Q. Do you know when Parker had appendicitis? When he quit?

A. I think I remember distinctly when it was.

Q. That was after that, was it?

A. After his first accident.

Q. That was after he went to work this time?

A. Yes, sir.

Q. That is, he had appendicitis. Then he had to leave for quite a while on account of appendicitis, did he?

A. Yes.

Q. That was after this time that you speak of?

A. Yes.

Witness Mareen (Tr., pp. 166, 167, 168) states, concerning the promise for employment (166), the agreement to pay doctor bills (167, 168), that they paid the doctor bill (168), and at 169 says:

Q. Did you make any statement to him as to what the custom of the company was, that is, to Parker, with regard to men that were hurt or laid off when injured?

A. Yes, I made—I told him our custom of paying the men half time while they were laid up in the case of accidents.

Q. And did you make any proposition to pay him that?

A. I told him we would do the same by him in

that case, and he brought up an item of a drug bill that I think was included. We agreed to pay that.

Q. And how many conversations did you have before the final settlement, as we will call it, or when this paper was signed with him?

A. I couldn't say as to that. We had quite a few along from time to time.

Q. What did you represent to him in this conversation with regard to job or work?

A. I told him what our custom was, and that we would— that the fact that he had lost his arm, wouldn't deprive him of the same in his case. **That we would give him steady work and we would find some place that he could do, some work that he could do.**

* * * * *

(Tr., p. 170.) Q. Was that made out on the day it was dated, September 25th?

A. Why, I couldn't say as to that. Sometimes the—

Q. It was about that time?

A. It was about that time. These documents are made out after the agreement is made, then the first time a man comes in, it is signed up.

Q. Now, at that time— what conversation at the time that was signed did you have with Mr. Parker?

A. I don't remember of any special conversation at that time, any more than in connection with signing it. We had it ready. It might have been signed the same day that I had the conversation with him; that is, I had the last conversation, the last talk with him in regard to it.

Q. What was said at that time about his employment, and about working for the company, his job?

A. I don't think there was anything said at that time.

Q. You had discussed that with him before, had you?

A. Had discussed that with him before.

Q. Now, what composed the terms that make up the amount of that statement that was put in there, if you remember?

A. Why, it was the regular half pay. I don't know whether the drug bill was in this amount, or whether that was given— a separate check given for that. I think it was in this amount, included in this account.

Witness states that this was after Parker was operated on for appendicitis; that he was under the impression that Parker was not at work, but does not know; that Parker was kept employed right along after signing the release; that Mareen saw him at various times and was interested in him.

(Tr. 170-172.) And concerning the conversation which Parker had about the agreement for employment not being in writing, the witness says:

(Tr. 172): Q. Mr. Parker has testified to having spoken to you at that time, about there being nothing in there about his employment?

A. I don't remember of any such conversation.

* * * * *

(Tr. 173): Q. Did you say anything to him at that time about his job? About his having that a

part of his settlement there, a job, anything to that effect?

A. We might have talked about it, yes. We might have talked about it before this was signed. I don't think we ever had an conversation after it was signed. The matter was closed and thoroughly understood.

Mareen admits the conversation between Mareen and Parker in the presence of Parker's mother, as testified to by Parker and his mother (Tr. 176, 177), and that Parker wanted to go back to work (Tr. 177). At Tr. 179, witness says:

Q. Mrs. Parker, in her testimony, says that Mr. Mareen admitted that the C. A. Smith Lumber & Manufacturing Co. had promised him work. Is that true?

A. That is correct.

Q. You had promised him work?

A. I had promised him work, yes.

Witness then claimed that the promise of work was not part of the settlement (Tr. 179), but said it was a part of the general custom of the mill to settle with men as he did with Parker. (Tr. 179, 166, 169, 177). And at 180, witness states:

Q. He wasn't working when this was signed, was he?

A. He had worked before that was signed, and after the first talk I had with him at the office, as I remember it.

* * * * *

(Tr. 181): Q. And how much is this settlement?

A. How much is it?

Q. Yes. I don't mean in dollars, but I mean in amount of his earning capacity?

A. I don't understand you.

COURT: You said it was one-half of his wages.

Q. Half regular pay, was it?

COURT: And the doctor's bill and the drug bill?

A. I presume the figures are half his wages.

Q. That is your presumption only?

A. That is my presumption. I didn't figure it out. Had nothing to do with the figuring.

And at pages 181, 182, the witness, after stating that Parker was getting \$3.00 per day, says:

Q. Now, did you pay him half his wages net to him, or did half his wages include the doctor's bill, and you take the doctor's bill out of his wage and pay it?

A. His settlement—half the wages that were paid is figured half the wages that the party was earning before the accident; the wages we paid him at the time of the accident.

Q. Did you pay that to him net or gross?

A. I don't remember as to those figures, whether they were net or gross.

Q. Now, did you have any men down there at Marshfield that were working for you, who had been injured in the mill, and whom you had kept in your employment at that time?

A. I couldn't state as to that. I think very likely that we did.

Q. But you don't know.

A. I couldn't swear to that, no, sir.

Q. Isn't it true that on this question of what you call your custom, that you told him your custom with the men in the east was to do that?

A. I don't know as to that. I might have told him that, but I think we had men employed around the plant at that time who were injured around the plant.

Q. But you won't swear to it?

A. I won't swear to it, no.

Witness then admits that Parker was hurt December 16, 1908, and (Tr. 184) says:

Q. Yes, sir. Now, wasn't your custom this: That when a man was hurt, that you paid him half pay, and took a release in full, and also gave him the job. Suppose they had refused to sign a release, what would you have done? Given him the job anyway or not?

A. We would have given him a job probably, until he commenced suit, if he did commence suit.

Q. Probably. You never had a case of that kind arise, did you?

A. I think we have, yes, sir.

Q. In this country?

A. I am not positive. Probably not before this suit. We have in this country, yes, sir, since then.

Q. Since then, not before?

A. No, I don't think so.

Concerning Parker's discharge, Mr. Mareen admits that it was because Parker, as administrator of his deceased brother's estate, had sued the company. (Tr. 184, 185, 186, et seq.)

The following facts, therefore, are admitted in this case:

- (a) Parker was injured December 16, 1908;
- (b) The injuries resulted in amputation of his hand;

(c) About May or June, 1909, negotiations for settlement were begun and practically agreed upon. The terms fixed were as follows: That Parker should have a steady job; that the company would pay his doctor bills and drug bills; that it would pay him one-half time from his injury.

(d) **At that time Parker went to work with the distinct understanding that he was to have a steady job, and worked about a month.**

(e) He had appendicitis, was operated on, and was absent from his work until about September.

(f) Thereupon he returned to his work.

(g) A release dated September 25th appears in the record.

(h) Nobody will swear that it was executed the day it bears date.

(i) However, he was given work under the agreement that he should have a steady job, and he actually worked for the company both before and after the release was given, and he was promised this steady job before, at the time of, and after the instrument was signed.

13. In this case, Parker states that it was the positive agreement that he would be and was given a steady job; he is sustained in this by the testimony of his mother, by the admission of Mareen to his mother, by Mareen's own testimony, and by the testimony of Bain.

After he went to work, the company fixed a trimmer for him. (Tr. 185).

Plaintiff's Theory of Case.

It was, and is the theory of the defendant in error that the agreement for a settlement was made in May or June, 1909, and thereupon Parker was given work in accordance therewith; that he worked for about a month under that agreement for settlement, and that the pretended release in evidence was simply a part performance of the oral contract which was executed by giving him employment, and this was the main object of his settling.

The complaint in this case was framed exactly upon this theory. See allegations VI, VII, (Tr. 7 and 8).

With this explanation of the theory of this case presented to the trial court, it will be found that the plaintiff in error has not cited a single case in point.

In none of the cases which it has cited are the elements above set forth, shown. The testimony specified herein is, we think, conclusive upon the designated points:

(a) That the settlement was agreed upon in May or June, 1909.

(b) That Parker went to work under that agreement for settlement.

(c) That he was then and there given a steady job.

(d) After his operation he returned.

(e) He was again put to work.

(f) The release, though dated September 25th, was not proven to have been signed that day.

(g) He was given steady employment and worked continuously until January, 1913. This employment was in accordance with the agreement made in May or June, 1909.

(h) Mareen and Parker both agree on the terms of the settlement. Mareen claims that it was the custom of the company so to do in settlements with injured men. Parker says it was expressly made in his case. Whichever is correct, it is admitted that the agreement was as alleged in the complaint.

Plaintiff in error has not cited a case where the agreement was of parol nature and was executed; nor where the injured man was put to work before, as well as after, the signing of the alleged release, nor where there was any such custom as Mareen claims existed in this case.

Taking up the citations by plaintiff in error seriatum:

1. Burdo v. Burgess, 83 N. E. 318.

The facts are nothing like those at bar. The case is a bald construction of the term "sole consideration."

2. 17 Cyc 621,—Facts not the same.

3. Coon v. Knapp, 8 N. Y., 402, 403.

Involves a receipt. The ruling is contrary to the decisions in Oregon cited heretofore.

4. Allen v. Rutland, 65 Atl. 138 (140).

Joint tort feasons. One was released; the other one sued, and the release held good defense. In that case a rule was announced which turns the case in favor of Parker, to-wit:

“The rule that written agreements cannot be varied by parol operates in favor of those who were parties to it, whenever it was executed by the latter as a final embodiment of their agreement—and parol evidence is offered to vary the legal effect of the terms in which it was expressed.”

No such facts exist at bar.

5. Squires v. Inhabitants of the Town of Amherst, 13 N. E. 609.

Action for damages in tort, and not for breach of executed parol contract.

6. Jackson v. Ely, 49 N. E. 792.

No executed parol agreement for work.

7. Cassilly v. Cassilly, 49 N. E. 795.

Is (1st) a receipt; (2) a release; (3) an instrument of gift—not in point.

The entire and complete relationship was expressed in writing.

8. D. & R. G. v. Sullivan, 41 Pac. 501 (504).

Joint tort feasons. One released, the other sued.

It was claimed the release given was a receipt for wages.

On this last point the case is contrary to

Bissett v. P. R. L. & P. Co., 143 Pac. 991 (Oregon).

9. Vaughan v. Mason, 50 Atl. 390.

Action for damages.

Per contra Bissett v. P. R. L. & P. Co., 143 Pac. 991 (Oregon).

10. Moore v. M. K. & T. R. Co., 69 S. W. 997 (1000).

Is opposed to Lumley v. Wabash Ry. Co., 76 Fed. 66; also G. N. Ry. Co. v. Fowler, (9 C. C. A., 136 Fed., 118).

11. Teague v. Ricks, 100 S. W. 795 (795).

An attempt to establish a parol trust in land contract of conveyance with a lease back to grantor.

12. St. L. & S. F. R. Co. v. Dearborn, 60 Fed. 880 (881, 882).

Action for tort which was settled.

13. The Cayuga, 59 Fed. 483 (485).

The case involved a proceeding to recover damages for things already released.

14. Boffinger v. Tuyes, 120 U. S. 198.

Clearly not in point.

15. Tate v. Wabash R. Co., 110 S. W. 622.

Executory contract, as distinguished from executed. In addition, the reply **in this case** puts in issue the very things which the reply there failed to do. The pleadings here admit that the document was signed **but the purposes and objects as set forth in the answer are clearly denied by the reply.**

16. Smith v. Ga. R. & B. Co., 62 S. E. 673 (674).

The contract was purely executory as to matters not recited.

17. Pennsylvania Gas Co. v. Thompson, 61 S. E. 829.

Action for injuries for which settlement had been made.

18. I. U. Ry. v. Houlihan, 60 N. E. 943.

An Indiana case which sustains Pennsylvania Co. v. Dolan, 32 N. E. 832, relied upon by defendant in error, and shows the distinction in the recitals. Concerning Pennsylvania Co. v. Dolan, this decision cites that case as illustrative of the considerations not contractual.

19. Clark v. Mallory, 56 N. E. 1099.

Release of one of two joint debtors as defense to action in debt.

20. Van Bokkelyn v. Taylor, 62 N. Y. 105, and
21. Harvey v. D. & R. G. R. Co., 99 Pac. 31,
are not on an executed parol contract.
22. Norfolk v. Mundy, 66 S. E. 61.

Not analogous to the case at bar.

23. Leddy v. Barney, 2 N. E. 107.

Action for injuries which had been settled for; also joint tort feasons and one released.

24. White v. Richmond & D. R. Co., 15 S. E. 197.

Plaintiff's evidence alone not sufficient to establish employment.

There the contract was executory as to hiring. Here it was executed. **The release contains express covenants**, among which is:

“He further covenants that he releases the defendant ‘from any further liability or care of me (himself) on account of said accident.’ ”

25. A. T. & S. F. Ry. Co. v. Van Ordstrand, 73 Pac. 113 (116).

Allusions to future employment made by agent. Action for negligence after settlement for negligence. Release different.

26. Myron v. W. R. Co., 32 Atl. 165.

Representations for future employment never fulfilled. No executed agreement.

27. Chaplin v. Gerald, 71 Atl. 712.

No executed parol agreement before release signed. No custom. No admitted contract.

28. Williams v. C. R. I. & P. R. Co., 158 S. W. 967.

29. Rapid Transit Co. v. Smith, 86 S. W. 322 (323).

Neither of these cases has the same facts. No executed parol agreement.

30. Millich v. Armour Co., 56 Pac. 1.

Not executed—wholly executory. Facts wholly different.

31. Jessup v. C. & N. W. Ry. Co., 68 N. W. 673.

Facts entirely different.

32. Cummings v. Baer, 31 N. W. 449. Not in point.

33. Baum v. Lynn, 18 Sou. 428 (430).

The guardian having devastated an estate, transferred property to his ward for release of his personal responsibility, and thereafter attempted to claim transfer as a bar to his responsibility as guardian.

How that case can apply here, we do not see.

As heretofore stated, the authorities cited by the plaintiff in error do not apply the points of this case at all.

Here the complaint is framed upon the theory of the executed parol contract which was executed prior to the signing of the document.

That the contract was made as alleged cannot be disputed.

Mareen claims that the payment of Parker's half salary from the time he was injured, December 16, 1908, to the settlement, was in accordance with the custom of the company. He did not qualify so strongly on the custom to give employment to a man unless he signed a release.

But Parker was given employment in June, 1909, and the contract there became binding.

Sealed and Unsealed Instruments.

The short space of time which we had in which to check the citations in plaintiff's brief has prevented us from accurately showing as to whether the cases upon which he relies are those which are based upon the common law distinctions between sealed and unsealed instruments. We feel confident that a number of these cases are from states and in jurisdictions wherein the distinction between sealed and unsealed instruments still exists. However, in Oregon, this distinction is abolished by statute.

Olston v. O. W. P. & R. Co., 52 Ore. 343 (349 et seq.).

The Issues.

An examination of the issues in the case will show that they are narrow and few.

The complaint (Tr., pp. 5-10) alleges:

Par. 1. The incorporation of defendant, which the answer admits.

Par. 2. That plaintiff is a millwright, which the answer admits.

Par. 3. That plaintiff was working for defendant in December, 1908; his earning capacity, and the deduction of the hospital fee.

The answer (Tr., p. 32) admits all of Paragraph 3 save where it denies that as part of the contract of employment the defendant (Plaintiff in Error) agreed to provide Parker with the services of a physician, and alleges that Dr. Dix was employed by Parker.

Par. 4. The injury in December, 1908; the treatment by the physician; the blood poisoning, and the necessary amputation of Parker's hand.

The answer (Tr., p. 33) denies Paragraph 4.

Par. 5. By reason of the matters Parker claimed to have a cause of action against defendant.

The answer (Tr., pp. 33-34) denies this.

Par. 6. That in the month of May, 1909, the agreement for settling the claimed liability was made and specifically alleges the oral agreement to give employment.

The answer (Tr., p. 34) alleges that the plaintiff and defendant entered into an agreement in writing on September 25, 1909, which has heretofore been set out. Also at Paragraph 7 (Tr., p. 34), that the

release was the only settlement ever made and "was the only release or settlement agreement ever executed by the plaintiff and the defendant, and was intended and understood by all the parties thereto to be and was a full and complete settlement," etc.

The reply (Tr., 39, 40) admits that the document was signed, but denies the other matters set forth.

Par. 7. That in pursuance of the agreement of May, 1909, to give Parker employment, he entered the employment of the C. A. Smith Lumber & Manufacturing Co. and continuously worked for them until January 31, 1913, earned the going wages as trimmer, and complied with the condition of his employment.

The answer (Tr., p. 35) alleges that by the written contract Parker is estopped, etc., and says:

"And admits that Mr. Arno Mareen, the general superintendent of defendant, voluntarily informed the plaintiff that as long as conditions were satisfactory, and his work properly performed, he, on behalf of the defendant, would be glad to employ the plaintiff at such work as he could properly perform, but denies that said settlement or agreement was entered into upon consideration of any terms to that effect, or that as a part of, or an inducement to said settlement, any promise or agreement to that effect was made or entered into by or on behalf of the defendant, or that there was any promise or agreement or consideration whatsoever for said settlement other than that set forth and included in said writing above set forth."

The reply puts in issue the new matter.

Par. 8. That at all times the Smith Lumber Company was running saw mills and employing men

at work which Parker could do, but that it has wrongfully discharged him.

The answer (Tr., p. 35, Par. 9)

“Admits that the plaintiff, both before and after said settlement, was employed by the defendant, and filled numerous different positions, and that he was employed for a time as trimmer in charge of a trimming machine in the mill of defendant; but denies that the plaintiff continued continuously in that position to the 31st day of January, 1913.”

Par. 9. Plaintiff alleges his age, earning capacity, etc.

Par. 10. States his ad damnum.

The answer (Tr., pp. 36 to 38 inclusive) alleges (X) that Parker voluntarily severed his relations with defendant without cause; (XI) avers the going wages for work at which Parker was employed are from \$2.50 to \$3.00 per day; (XII) admits Parker's capability of earning \$3.00 per day, and his capacity as a trimmer, measurer, etc.; (XIII) admits that the C. A. Smith Lumber & Manufacturing Company (Plaintiff in Error) was running its mill, but alleges that the mill was then shut down and not in operation; denies that Parker was willing to perform services, etc.; admits that defendant has not employed plaintiff since said date; (XIV) avers plaintiff's employment at other occupations; and (XV) denies all things not admitted.

The reply puts in issue the affirmative matters.

It is, therefore, seen that the issues were narrowed to the following:

1. Whether a verbal settlement was made about May, 1909.

2. Whether the employment was a part of the verbal settlement.

3. Whether the release was the sole or only settlement which they made.

4. Whether it expressed the full agreement.

Upon these issues, the verdict of the jury was in favor of the plaintiff, and the evidence conclusively shows that the oral contract which was made in May or June, 1909, was concluded before the release was executed.

In support of this, we state:

1st. The answer admits, and both parties testify that Parker entered the employment of the C. A. Smith Lumber & Manufacturing Co. **before the release was signed.**

2nd. Parker says it was in accordance with the agreement. The company denies that.

3rd. The doctor bill of \$175 (Tr., pp. 127, 128) was paid before the release was signed.

(Parker, Tr., pp. 128, 129, 131.)

(Mareen, Tr., p. 168.)

4th. The release, in all probability, was made out and waited several days before it was signed.

(Mareen, Tr., p. 170.)

5th. At the time the release was signed, Parker called Mareen's attention to the absence of provision for a job in it and was assured that the job was all right anyway.

(Parker, Tr., p. 129):

A. Well, at the time I had that settlement, he told me then that— I asked him why he didn't put

that in writing, and he says these blanks are already made out, etc. He says will be no trouble about any settlement we have.

(Tr., p. 135.) Q. You called his attention, you say, to the fact that that wasn't— about the job wasn't in the written form there at all?

A. I called his attention to it at the time, yes.

Q. What did he say about that?

A. Well, he says, these here are made up in form like, and the company has this kept on record; “in regard to your being kept to work, that will be all right,” he says. “You will always be kept employed.”

Q. “You will always be kept employed,” and after that you went to work, did you, right away?

A. Yes, sir.

Witness Mareen (Tr., p. 173):

Q. Did you say anything to him at that time about his job? About his having that a part of his settlement there, a job, anything to that effect?

A. We might have talked about it, yes. We might have talked about it before this was signed. I don't think we ever had any conversation after it was signed. The matter was closed and thoroughly understood.

And at page 180, Mareen says:

Q. When was it that you first promised him work, and that he could have it as long as he wanted it?

A. The first time I talked with him in the office.

Q. The first time you talked with him after he was hurt, and you— how often did you repeat that?

A. What is that?

Q. How often at other times? How many other times did you tell him he could have steady work?

A. I outlined the proposition at that time, and while it might have been referred to at our other meetings, **it was taken care of at that time.**

The above is from Mareen's direct examination.

On cross examination, he says (Tr., p. 180):

Q. And you made this settlement for— this settlement in this release that is in evidence, before he went back to work steadily, didn't you?

A. Made this settlement?

Q. Yes.

A. No.

Q. He wasn't working when this was signed, was he?

A. HE HAD WORKED BEFORE THAT WAS SIGNED, AND AFTER THE FIRST TALK I HAD WITH HIM AT THE OFFICE, AS I REMEMBER IT.

Concerning the sum that was paid Parker as half his earning capacity, the following is uncontradicted:

Parker (Tr., p. 131):

Q. (Referring to the release.) And it reads it is for \$410.75. How did you arrive at that amount?

A. What?

Q. How did you arrive at that amount, \$410.75?

A. He figured up the time I lost, split my wages in the middle.

Q. Called it half time?

A. Called it half time.

Q. And what did you add to that?

A. Didn't add anything to it.

Q. Didn't add anything to it. They paid the doctor \$175.

A. Yes, sir.

Q. They paid that too, did they?

A. They had paid that beforehand.

We repeat that there is not a case or an authority which counsel cites that is analogous to this case and its facts.

Under the circumstances of this case and the issues made up in the pleadings, the Court correctly admitted evidence as to the true agreement of the parties and submitted the entire contentions to the jury.

Mobile, etc., R. Co. v. Jurey, 111 U. S. 584 (597); (Book 28 L., 527, especially 530).

In the above case, the court says:

“The first assignment of error argued by the counsel for plaintiffs in error relates to the admission in evidence of the testimony of Jurey and Scott, in respect to the terms of the contract by which the Railroad Company undertook to transport the cotton of the defendants in error to New Orleans. The contention is that the bill of lading was the contract, and being in writing, no parol evidence could be received to vary its stipulations. Before this rule can be applied, the contract in writing must be shown to be the contract of the parties. One of the vital questions in the case was, what was the contract be-

tween the parties? No particular form or solemnity of execution is required for a contract of a common carrier to transport goods. It may be by parol, or it may be in writing; in either case it is equally binding. (Cases.) The defendants in error insisted that the contract between them and the railroad company was by parol; that it was made between Jurey, for the defendants in error, and by Scott for the railroad company; and denied that the bill of lading was the contract, and alleged that it had never been delivered to the defendants in error, but only to Hall, who was not authorized to make a contract for them. It is plain, upon this statement of the controversy, that evidence of the parol contract was perfectly competent, and it was a question to be decided by the jury whether the understanding as detailed by the witnesses or the bill of lading expressed the agreement of the parties. The evidence that the contract was by parol and was not the contract expressed in the bill of lading, came from Jurey, one of the defendants in error, and from Scott, the agent of the plaintiff in error, between whom it was made, and was not contradicted. The contention that this evidence should have been excluded is certainly not based on any solid ground. There is nothing in this assignment of error for which the judgment should be reversed."

In *P. C. Co. v. Yukon*, 155 Fed. 29 (page 37) (9 C. C. A., per Hunt, J.), this court says:

"The appellants earnestly contend that the court erred in admitting evidence of a prior parol agreement between the parties which tended to modify the terms of the bills of lading. The evidence so admitted tended to prove the negotiations antecedent to the shipment and the common understanding that the appellants intended to take advantage of the market prices

prevailing at points on the Yukon River at the opening of navigation. It tended to show that the probable presence of ice in the St. Michaels Harbor was contemplated, and that the contract was made with the special understanding that delivery was to be made as soon as the harbor was free from ice. It showed also that the bills of lading were signed late at night, and at about the last minute before the boat went out. All of this evidence was admitted for the purpose, not of modifying the provisions of the bills of lading, but of showing the intent and purpose of the contracting parties, and aiding the court to construe the bills of lading with reference to that intent. The bills of lading were printed forms applicable to different consignments of goods to different ports. In *Hutchinson on Carriers* (3d Ed.) Sec. 622, it is said:

“ ‘But the main object and intent of the contract is the voyage agreed upon, and, while the printed general words must not in construing a contract be discarded, it is well recognized that, when considering what the main object and intent of the contract is, it is proper to bear in mind that a portion of each is on a printed form applicable to many voyages, and is not especially agreed upon in relation to the particular voyage.’ ”

“See, also, *Marx v. National S. S. Co.* (D. C.), 22 Fed. 680; *Mobile & Montgomery R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527.

“But if, indeed, the parol testimony so admitted in evidence did have the effect to modify some of the provisions of the bills of lading, it was, under the circumstances disclosed in this case, admissible for that purpose, for the bills of lading were issued after the goods had been

delivered on board the Senator, and after they had passed from the control of the shipper, and the vessel was about to go on her way. The burden was then upon the carrier to show that its agents directed attention to the terms of the bills of lading and that the shipper assented to them. (Cases.)”

So, in the case at bar, the prior parol contract of May or June, 1909, under which Parker was put to work, and under which the doctor bills were paid, was a valid or subsisting contract, and Parker denies that the mere formal receipt dated September 25, 1909, was the contract between them.

Under the issues of the case, the court had no alternative except to hear the entire controversy, and the verdict of the jury being in favor of Parker, it must stand.

The appellant does not contend that the evidence was insufficient to sustain the verdict—his sole contention is that the court erred in admitting oral testimony.

Indeed, in the assignments of error, which are discussed in the brief, as well as in the bill of exceptions itself, there is no error predicated upon the admission of the evidence. The sole errors charged relate to the overruling of the demurrer; the motion for non-suit; the motion for directed verdict; the motion for new trial; and the instructions given by the Court. At no place does counsel assign or argue or discuss any error in the admission or rejection of testimony.

For all these reasons, we respectfully submit that this case should be affirmed.

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ISHAM N. SMITH, Portland, Oregon,

Attorneys for Defendant in Error.

Due service, by three certified copies, accepted
at....., this..... day
of February, 1915.

.....

Attorney for Plaintiff in Error.

No. 2504

**United States Circuit Court
of Appeals**

for the Ninth Circuit

C. A. Smith Lumber & Manufac-
turing Company, a corporation,
Plaintiff in Error.

vs.

John A. Parker,
Defendant in Error.

Reply Brief of Plaintiff in Error

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Filed

FEB 23 1915

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Reply Brief of Plaintiff in Error

Indulging in the familiar artifice of befogging the issue, counsel for defendant in error states in his brief (p. 17) that we have misconceived the basis of the action; and that this action is upon an executed parol agreement.

The issues in this case are not complex or intricate. They are so absurdly simple that we sincerely believe the court need look no further than the pleadings to find reversible error.

The complaint alleged (Tr. p. 7, par. 6) that the defendant made and entered into an agreement with the plaintiff

“by the terms of which the plaintiff signed a release in writing, (set forth in full and made a part of the complaint by stipulation (Tr. p. 27) * * * the defendant then and there * * * agreeing orally * * * as a further consideration for such a release to give him employment so long as he wanted it.”

The complaint specifically declared upon a writing and an additional parol agreement which contradicted the terms of the writing, and not upon an executed parol agreement as now asserted.

To the issue thus squarely tendered a demurrer was interposed and overruled and this we insist constituted reversible error. The cases we have cited in our main brief are controlling authorities and squarely in point on this question, and this issue cannot be obscured by the cloud of ink which counsel, with cuttlefish cunning, seeks to envelop it. Pages of his brief are devoted to quotations from the testimony. We say the testimony was not admissible and should not be in the record.

Even at the trial counsel for Parker by a series of leading questions was careful to accentuate the fact that the parol agreement and the writing were contemporaneous and parts of the same transaction.

“Q. And what statement if any did they make to you at the time this release was signed about giving you a job and what kind of a job?

A. Said would always give me a job

and something better than common work.

Q. That was part of the whole settlement?

A. Yes sir." (Tr. p. 110-111.)

"Q. I thought I had asked you the question as to how long, if at all, they told you this job would last; **when they made this settlement?**

A. Told me it would last as long as I wanted the job.

Q. Now that I understand was **a part of the promises upon which you made the settlement?**"

A. Yes sir." (Tr. p. 116.)

Without in the least desiring to discredit counsel's remarkable agility, we call the court's attention to p. 117 of the transcript:

"Mr. Smith * * * for this release of \$400.00 **we say there was an additional consideration for the release**
* * * "

Parker's testimony is conclusive that the alleged agreement to furnish employment was a **contemporaneous agreement** and not an executed parole agreement standing alone.

"Court: What did Mareen say at the time you signed that written agreement about your work?

A. Well, at the time I signed the agreement, he promised to keep me employed." (Tr. pp. 131-132.) * * * *

“Q. And you understood that as soon as you got over the appendicitis you could go back to work, didn’t you?

A. Yes sir, hadn’t settled with them at the time I got appendicitis.

Q. You hadn’t settled with them?

A. Hadn’t settled. We had talked over, but we had never settled anything.

Q. Oh. When you got this final settlement, I am trying to get at just what was said when you signed these papers. That was the time you settled when you signed these papers?

A. **That was the final settlement.”**

(Tr. pp. 132-133.)

The issue, then, was purely and simply whether the written release of compromise and settlement could be contradicted by parol evidence of a contemporaneous agreement. In his complaint and at the trial that was the theory of counsel for defendant in error, but now in an effort to side-step the effect of the decisions we have cited he claims an entirely different theory (p. 33 of his brief) namely, that his action is upon an executed oral agreement, and states that:

“With this explanation of the theory of this case presented to the trial court, it will be found that the plaintiff in error has not cited a single case in point.”

We respectfully insist that our cases are squarely in point and controlling and that the court from a

mere inspection of the complaint and demurrer will find reversible error. The true issue is further disclosed by the opinion on demurrer of the court below (Tr. pp. 30-31) and the authorities there referred to, all of which we have discussed in our main brief. A mere reading of this opinion will disclose that counsel's present theory of an antecedent, separate, executed parol agreement is an afterthought and was not advanced in the court below.

Throughout his brief, in his argument and in his attempt to distinguish the cases cited in the brief of plaintiff in error, counsel for defendant in error relies on this new theory of an executed parol agreement which he claims was made in May or June, 1909. By so doing he contradicts his own witness and client (Parker) who emphatically and repeatedly testifies that he did not make any agreement or settlement until the release was signed. He testifies that he went to work in May, 1909 (Tr. p. 107) that there was some conversation concerning settlement, but he was asked by his counsel if he accepted and he replied:

"A. No, I didn't accept it at that time, so I said I would think it over and see * * * " (Tr. p. 108).

According to his testimony he continued working and there were further negotiations concerning doctor's bills and medicines, and he worked about a month.

"I worked about a month or a little over and took appendicitis. I was laid up some little while. At that time I

had no—I didn't have a settlement."

Q. That was before the settlement?

A. That was before the settlement, **we had talked the thing up before that but we hadn't settled** so I didn't go to their doctor again. I went to another hospital and had an operation for appendicitis, **and was laid up probably three months * * *** (Tr. p. 109).

He went to work in May and worked a month, that is until some time in June, then he was laid up for three months, which would be in September, before he had any agreement or settlement. How can his counsel, in the face of this testimony, brought out by himself, now claim that there was an **"executed oral agreement"** in May or June? Indeed, to clinch the matter and leave no doubt in the minds of the jury as to the time when the agreement or settlement was made he was asked:

"Q. Now, let's come back to the actual date of this settlement. You say that was after you had been operated on for appendicitis?

A. Yes sir." (Tr. p. 109).

Having carefully led his witness through all the negotiations and transactions leading up to the settlement and signing of the release, which Parker himself says was in September (Tr. p. 110) he asked him repeatedly about the "ultimate promises," and the "final settlement as to employment" (Tr. p. 110) and then was careful to ask him:

“Q. That was part of the whole settlement?

A. Yes sir.” (Tr. p. 111.)

There was but one settlement, and but one agreement. Parker’s testimony is absolute that there was no contract, executed or otherwise, prior to the final settlement in September.

The alleged promise to furnish employment was contemporaneous with and directly contradicts the written release.

This brings us to an examination of the authorities cited by defendant in error, which we will consider in the order in which they are cited on pages 9 and 10 of his brief.

Holmboe vs. Morgan, 69 Ore. 395, 138 Pac. 1084.

We can not believe that counsel is serious in arguing that this case, or any other, holds that the rule against varying writings by parol applies only to contracts which the Statute of Frauds requires to be in writing. The rule applies to all public or official records, documents, or proceedings, and to all private writings, including contracts of all kinds, regardless of the statute of frauds. Even a mere receipt, if it also embodies the elements of a contract, is, so far as it expresses the contract, subject to the same rule as other contracts and is not open to contradictions by parol.

17 Cyc. 632, citing cases from practically all the states.

Among the cases cited is one in which the opinion was written by Hon. Robert S. Bean who wrote the

opinion on demurrer in the court below, then Chief Justice of the Oregon Supreme Court. The facts were that a receipt in the following form had been given:

“Portland, Ore., March 30, 1898.

“Received of Peter Covacevich warranty deed to lot of 50x100 feet on Division and Thirty-second Streets, the said conveyance being in full payment of all labor and services rendered by me for the said Covacevich, with the understanding that I am to receive an additional one hundred dollars when the remainder of the four (4) acre tract owned by the said Covacevich on Division Street is sold.

(Signed)

Mark Milos.”

Milos, who signed the receipt, brought an action, claiming an oral agreement to deliver a fishing net, deed him certain real property, etc. The court held that the alleged oral agreement was void because of the statute of frauds. It will be noted that there is nothing in the receipt above quoted which the statute of frauds requires to be in writing, but the court held its terms could not be contradicted by parol. In conclusion the court said:

“A mere receipt is always open to explanation, and may be varied by parol, because it is simply an admission or declaration in writing; but where it also embodies the elements of a contract, the latter is subject to the same

rules as any other contract: 19 Am. & Eng. Ency. Law (1 ed.), 1123, and notes: *Conant v. Kimball's Estate*, 95 Wis., 550 (70 N. W. 74); *Jackson v. Ely*, 57 Ohio St. 450 (49 N. E. 792); *James v. Bligh*, 11 Allen, 4; *Egleston v. Knickerbacker*, 6 Barb. 458; *Coon v. Knap*, 8 N. Y. 402 (59 Am. Dec. 502); *Goodwin v. Goodwin*, 59 N. H. 548. By the writing in question, binding on the plaintiff by his signature and on the defendant by its acceptance, it is, in effect, agreed that the execution and delivery of the deed and the subsequent payment of the \$100 is a full satisfaction and discharge of the defendant's indebtedness. To permit the plaintiff to show by parol that he was to receive the fishing net in addition to the items specified in the writing would, it seems to us, clearly be permission to add to or vary the writing, and therefore incompetent. From these views it follows that, if the case is to be considered independently of the writing, on the theory that it was not intended to express the terms of the contract, the plaintiff must fail because of the statute of frauds. If, on the other hand, the writing is to be deemed

evidence of the contract for one purpose, it must be for all, and he must fail because of the incompetency of evidence to vary or contradict the writing.

In either view, the judgment must be reversed, and it is so ordered."

Milos v. Covacevich, 40 Ore. 239 at 241.

Concerning receipts amounting to accord and satisfaction Cyc has the following:

"When the receipt contains anything in the nature of an agreement upon the compromise or settlement of disputed claims or unliquidated damages that one party shall accept and receive from the other a certain sum of money or certain property in satisfaction and discharge, the paper signed is a contract and must be treated as such, and in the absence of fraud or mistake can not be varied or contradicted by parol."

17 Cyc 634, and cases cited.

The general rule as to parol or extrinsic evidence affecting writings is stated in Cyc at page 567, Vol. 17, where it is said that the rule applies to any contract. At page 569 it is stated:

"It has been asserted that the rule is one of evidence merely, and does not depend upon the doctrine of estoppel at law, **nor upon the statute of frauds,** * * * "

In support of this text the case of *Reid v. Diamond Plate Glass Co.*, 85 Fed. 193, is cited. This case was decided by the United States Circuit Court of Appeals for the Sixth Circuit. The decision said in part:

“Apart from any particular question of the statute of frauds, there is an ancient rule of evidence, of wide application, resting upon substantially the same principle as the statute of frauds, which does not permit parol testimony to be recieved to contradict, vary, add to, or subtract from the terms of a valid written instrument. 2 Jones Ev. 437, 438, 446; 1 Greenl. Ev. Sec. 275; 2 Tayl. Ev., Secs. 1132, 1133.”

Reed v. Diamond Plate Glass Co., 85 Fed. 193 at 195.

Of course, where a contract is partly written and partly oral, the oral part may be proven, provided that part is not required by the statute of frauds to be in writing. This is all that was said or meant by the Court in the case of *Holmboe v. Morgan*.

But where the contract is in writing and not ambiguous, whether within or without the statute of frauds, it is presumed to be the entire contract; it is presumed that there is no oral portion and therefore the statute of frauds has no application.

***Pennsylvania Co. v. Dolan*, 32 N. E. 802.**

This case has been fully discussed in our main brief. It was not decided by a court of last resort,

is peculiar to Indiana, and is distinguished from the case at bar by reason of the fact that here this agreement expressly provided that the consideration was the **sole consideration**.

Cox v. B. & O. S-W. R. Co. 50 L. R. A. N. S. 453.

This case holds only that a contract to give employment may be by parol; is not within the statute of frauds and is not against public policy. The decision has no bearing on the question at issue here.

Barghoorn v. Moore, 57 Pac. 265.

Involved a contract not reduced to writing, in which a receipt and certain notes were given. Fraud was pleaded. Held that the receipt could be explained by parol. The receipt was in no sense a release. There is nothing in the case which is applicable to the case at bar.

White v. Merrill, 32 Ill, 511.

Involved a mere receipt. The true rule in Illinois, where a release is involved, is stated in *Clark v. Mallory*, (Ill.) 56 N. E. 1099.

Allen v. Tacoma Mill Co. 51 Pac. 372.

This case is distinguished in our main brief at p. 38. It is based upon a Massachusetts case where a mere receipt was involved and **mistake** was pleaded.

Rader v. McElvaine, 21 Ore. 56.

Holds that a mere receipt is only *prima facie* evidence of the matters therein stated. No question of a release or written agreement involved.

Looney v. Rankin, 15 Ore. 617.

So far as this case is in point, it supports our contention. It holds that a written contract can not be varied by parol except in case of ambiguity, omissions, mistake and the like. There is absolutely nothing in the decision which supports the position of defendant in error.

Lewis v. 1st Nat'l Bank, 46 Ore. 182.

Holds that it may be shown by parol that at the time a warehouse receipt was pledged to secure a loan a certain oral agreement was made; and recognizes the general parol evidence rule.

Morse v. Rice, 36 Neb. 212; 54 N. W. 308.

Holds that a written receipt may be explained or contradicted by parol testimony, but where it embodies a contract it can not be contradicted, but is conclusive upon the parties in the absence of fraud or mistake.

Warner v. T. & P. R. Co., 164 U. S. 416.

Holds that a verbal contract to build and maintain a switch is not within the statute of frauds. There is nothing in the decision even remotely in point as applicable to the case at bar.

Hobbs v. Brush Elec. Co. (Mich.) 42 N. W. 965.

The rule as to varying written contracts by parol is not discussed or even mentioned in this case. Plaintiff, an employe, had been injured; the employer had voluntarily paid his hospital bills and wages while disabled; he had signed a release, in which, apparently, the consideration was not stated; suit

was brought for damages for the injuries, alleging an oral agreement to furnish employment. The release was attacked for total want of consideration. The court held that "the rule created by statute that sealed instruments may be impeached for want of consideration applied to the release in question; that the agreement to furnish employment was legal and binding and if not complied with the plaintiff might in another action sue on that agreement; that in order to obtain employment he had executed the release. Unlike the case at bar, there was no consideration for the release except the promise to furnish employment. On the ground of total failure of consideration under the statute, the court said the release might be impeached. In conclusion, the court said:

"The settlement appears to have been satisfactory to both parties, and nothing is shown to impeach its validity."

The judgment of the lower court directing a verdict for the defendant was affirmed.

If there was no consideration stated in the release, naturally it would not be contradicted by showing what the consideration was. In the case at bar the amount stated was agreed to be the sole consideration.

Fire Insurance Co. v. Wickham, 141 U. S. 564.

This decision recognizes the rule for which we are here contending, and there is nothing therein to support the position taken by defendant in error. All

that was held was that concerning the **receipts** there considered.

1. Parol evidence was admissible to explain the receipt;

2. The paper so signed by the parties **was not in the nature of a contract.**

The receipt in full was for a fire loss and was for one half the amount actually ascertained as the amount of the loss. The court found that there was no consideration for the release of the whole amount, but also distinguished such a case from one where the settlement was a compromise of unascertained or unliquidated sums. On page 581 the court says:

“There is no doubt that when a receipt **also embodies a contract** the rule applicable to contracts obtains, and parol evidence is inadmissible to vary or contradict it.”

The court further recognizes the general rule at p. 576, and refers to *Seitz v. Brewers Refrigerating Co.* appearing at p. 510 of the same volume (141 U. S.) a case decided at the same term by the Supreme Court, where it is said: (Syllabus)

“When a contract is couched in terms which import a complete legal obligation, with no uncertainty as to the object, or extent of the engagement, it is, (in the absence of fraud, accident or mistake) conclusively to be presumed that the whole en-

gagement of the parties and the extent and manner of their understanding were reduced to writing."

This case of Fire Association v. Wickham is spoken of and distinguished by the Circuit Court of Appeals in *The Cayuga*, 59 Fed. 483, at 486, a case squarely in point and cited at pages 31 and 32 of our main brief, as follows:

"We have not overlooked the case of *Association v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84, where the effect of a receipt and release somewhat similar to the instrument in the present case was considered. But there the release was construed to have reference to the provision in the policy for terminating it at any time, and the policy had not yet expired. Besides it was held that there was no consideration for the release, if that were construed as a surrender of the claim upon which that suit were brought. No doubt, if there were any mistake in the agreement, it might be reformed upon proper proceedings for that purpose; but, so far as appears, no complaint that this instrument was not what was intended was ever made or suggested until its effect was brought into controversy in the present case."

**Pierce v. Tennessee Coal, Iron & Ry. Co. 173
U. S. 1.**

In this case the decision turned wholly upon a construction of a written agreement. The question of varying a written contract by parol was not raised or passed upon.

**Hobbs v. Brush Elec. Co. 42 N. W. 965, and
Pennsylvania Co. v. Dolan, 51 Am. State, 289.**

These cases are again cited at p. 10 of the brief of defendant in error. They have already been discussed. The next case cited is that of

**Gourley vs. West Chicago St. R. Co. 96 Ill.
App. 68.**

In this case the consideration named in the release was \$1. It was held that such a release standing alone and unexplained was a complete bar to an action for injuries, and the Court also passed on the question of what proof was necessary to show **fraud**.

**Smith v. St. Paul & D. R. Co. 60 Minn. 330, 62
N. W. 392.**

In this case the parol evidence rule was not even mentioned. A release was given in consideration of a promise of employment and the court held this promise was a sufficient consideration for the release. No such question is at issue here.

**Boggs v. Pacific Steam Laundry Co. 171 Mo. 282,
70 S. W. 818.**

Just why counsel should cite this case is hard to understand. We are more than willing to concede all that is held in the opinion. The plaintiff had a

claim for personal injuries against the defendant, executed a written release, in which the defendant agreed to employ him **as long as it saw fit**. It will be noted that the agreement to employ was in writing. The plaintiff did not at the time deliver the written release but went to work on an alleged oral agreement on the part of the defendant to employ him for life.

Plaintiff afterward delivered the written release, continued in defendant's employ until discharged and then brought suit on the alleged oral agreement. The court held that as the written release was not complete until delivery, it was subsequent to the oral agreement and superseded it, **and that plaintiff had no rights under the oral agreement**. The case is so strongly against the defendant in error, even as applied to his new theory on appeal, of an executed parol agreement, that we quote in part from the opinion:

“The case stated and proved for the plaintiff is an oral agreement made before the written agreement was entered into. It is clearly, then, such a case as Greenleaf on Evidence, in the section quoted, treats of. It is “oral testimony of a previous colloquium between the parties,” or oral testimony “of conversations or declarations at the time it was completed,” which is rejected because “it would tend in many instances to substitute a new and different con-

tract for the one which was really agreed upon." Such matters are rejected because "it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing." The case made is not one where the agreement was verbal and entire, and only a part was reduced to writing, nor where the oral agreement relates to an independent collateral contemporaneous matter, nor where a complete contract in writing is afterwards abrogated by a subsequent parol agreement. For the petition distinctly charges that the oral agreement was made before the written agreement became complete by delivery, and the evidence is to the same effect. The written and oral agreements are so repugnant that they cannot stand together. Inasmuch as the plaintiff's case is that the written agreement was made (that is, became complete by delivery) after the oral agreement was made, the written agreement abrogates the prior oral agreement. The case would have been different if it had been charged and proved that the written agreement was completely entered into, but was afterwards changed by the oral agreement.

That would have made a case for the plaintiff to go to the jury on. But as it is, the petition stated no case, and the testimony made out none. **The fact that such testimony was admitted without objection is of no consequence, for its legal effect after it was admitted was a question of law for the court, and not a question of fact for the jury.** It showed an oral agreement to employ the plaintiff for life, and a later, subsequent written agreement to employ the plaintiff, not for life, but for only such a time as it might please the defendant to retain him. He was employed from April 9, 1889, to August 7, 1897. It was therefore the duty of the court to determine the legal effect of the subsequent written agreement upon the prior oral agreement. There was no fact for the jury to find. The demurrer to the evidence properly raised this question of law, as a demurrer to the petition would have done. The trial court erred, therefore in refusing to give the peremptory instruction at the close of the plaintiff's case, and that court acted properly when it granted a new trial for that reason, *inter alia*."

Boggs v. Pacific Steam Laundry Co.,
70 S. W. 818 at 821.

**Forbs v. St. Louis, etc. R. Co. 167 Mo. App. 661,
82 S. W. 562.**

In this case the written release is set forth in full, and was given "for and in consideration of the re-employment of said F. M. Forbes by said railway company." Plaintiff afterward sued for injuries and the trial court directed a verdict for defendant. On appeal the court held that the agreement to re-employ constituted a good consideration for the release; that the release "confronts plaintiff as an impassable barrier to the maintenance of this action," and sustained the court below in directing a verdict for the defendant. Just how this decision supports defendant in error in the case at bar is difficult to discern.

**Usher v. N. Y. Cent. etc. R. Co. 76 N. Y. App.
Div. 42; Affirmed Without Opinion in 179
N. Y. 544.**

A release was given in consideration of a promise to employ plaintiff for life at half the salary he had previously earned. It was held that the contract was not invalid as unreasonable. The case is not in point.

**East Line Ry. Co. v. Scott, 72 Texas 70; 10
S. W. 99.**

This case is not in point. The court held that an oral contract to employ might be shown as part of a compromise settlement, although in fulfillment of the compromise a judgment had been entered **which did not embody or mention the parol agreement.**

The court said:

“The agreement of the parties for compromise was oral, and the judgment rendered does not undertake to embody it, nor does it even recite that it was rendered in accordance with an agreement.”

Midland R. Co. vs. Sullivan, 20 Tex. Civ., App. 50; 48 S. W. 598.

The parol evidence rule was not considered or discussed. All that was held was that an agreement to reemploy is a sufficient consideration for a release for injuries.

Carroll v Missouri R. Co. 30 Tex. Civ. App. 1; 69 S. W. 1004.

Here again there was no question of contradicting a written contract by parol. The consideration **stated in the release** was an agreement to give employment “for such time only as may be satisfactory to said company.” The action was for damages for the injuries and the appellate court sustained the trial court’s action in instructing a verdict for defendant, holding that although the agreement to give employment for an indefinite time was no consideration for the release, yet the employment given after the release was under the contract evidenced thereby, and was a sufficient consideration for the release.

Rhoades v. Chesapeake R. Co., 49 W. Va., 495; 39 S. E. 209.

In this case also, the agreement to furnish em-

ployment was a part of the written release and not contained in an alleged contemporaneous agreement which contradicted the writing. There is nothing in the decision which is applicable to the case at bar.

We have now discussed and carefully and fairly stated the effect of every case cited by counsel in support of the propositions advanced on pages 9 and 10 of his brief, namely, that

“Parol evidence thereof was admissible” (p. 9) and

“And in the following state decisions, cases of like import have been sustained whenever and wherever presented” (p. 10).

Not a single case is in point, except *Pennsylvania Co. vs. Dolan*, and that case, as stated in our main brief, stands alone, is peculiar to Indiana, was not decided by a court of last resort, and is distinguished from the case at bar by the fact that here there is an additional agreement as to the consideration named being the sole consideration.

None of the cases cited are discussed in the brief. The argument in the brief consists principally of extracts from the testimony tending to prove that there was an oral contract to employ, wholly disregarding our contention **that such testimony was not admissible.**

Each case cited in our main brief is disposed of by counsel for defendant in error by the brief assertion that it is not in point, that the facts are differ-

ent or that there was no "executed parol contract," and on page 41 of his brief counsel again states that his complaint is "framed upon the theory of the executed parol contract which was executed prior to the signing of the document. As before pointed out this is an obvious attempt to side-step the chief issue here for the reason that the complaint (par. 6, Tr. p. 7) expressly declares upon

**"an agreement * * * by the terms
of which the plaintiff signed a release
in writing * * * and agreeing orally"** etc.

Again, Parker's testimony is conclusive that there was but one contract and one settlement and that was at the time the release was signed in September.

On page 41 of his brief counsel again states

**"But Parker was given employment
in June, 1909, and the contract there
became binding."**

Does the fact that Parker was given employment constitute a contract?

What did Parker do or give at that time as a consideration for this "executed parol contract" to employ him? The true facts are that the employer did all in its power to help Parker, gave him employment, paid his doctor bills, his hospital bills, etc. What injury had Parker received? He scraped the skin from his leg, and continued with his work (Tr. p. 118). He had blood poisoning in his **hand**, not in his injured leg. He had appendicitis and attributed all these misfortunes to the employer and

claimed a liability. But this question of liability was never determined, his damages were never fixed and determined. On the contrary they were unliquidated and the employer in good faith gave him employment as soon as he was able to work, paid his bills, and endeavored to and did compromise the whole matter. Surely this is not a case to shock the conscience of the court, even if it were inequity. He was treated fairly throughout; there is no allegation or evidence of fraud, unfair treatment, duress or mistake.

Getting back to the question of an alleged executed oral contract of employment we can do no better than to again call attention to one of the cases cited by counsel for defendant in error, namely, *Boggs vs. Pacific Steam Laundry Co.* 70 S. W. 818, where the court holds that, such a prior executed oral contract as is now claimed to exist would be nullified by the subsequent written agreement. Although much has been said in counsel's brief, of this new theory, no authorities in point are cited to sustain his contention. He cites two cases only on this point, namely *Mobile, etc. R. Co. vs. Jurey*, 111 U. S. 584, and *P. C. Co. vs. Yukon*, 155 Fed. 29. Both were decided on the ground that the agreement was oral and that the bill of lading was not the contract. In the *Mobile* case it appeared that the bill of lading "had never been delivered to the defendants in error, but only to Hall, who was not authorized to receive it."

In the case of *P. C. Co. vs. Yukon* the Court said:

“All of this evidence was admitted for the purpose, **not of modifying the provisions** of the bills of lading, but of showing the intent and purpose of the contracting parties, and aiding the court to construe the bills of lading with reference to that intent.”

Counsel further claims in his brief that at no place do we assign or argue or discuss any error in the admission or rejection of testimony. In this connection we call attention to the motion for non-suit which, as was said in the case of *Boggs vs. Pac. Steam Laundry Co.*, supra, raised a question of law for the court to decide. In that case the court said:

“The fact that such testimony was admitted without objection is of no consequence, for its legal effect after it was admitted was a question of law for the court, and not a question of fact for the jury. * * * * *

“The demurrer to the evidence properly raised this question of law, as a demurrer to the petition would have done. The trial court erred, therefore, in refusing to give the peremptory instruction at the close of the plaintiff’s case, and that court acted properly when it granted a new trial for that reason, *inter alia*.”

Boggs v. Pac. Steam Laundry Co.
70 S. W. 818 at 821.

Counsel for defendant in error has also submitted additional authorities since the argument. These additional authorities are two in number and are as follows:

Hot Springs Ry. Co. v. McMillan 88 S. W. 846, and **Jackson v. Pac. Coast Condensed Milk Co.** (Ore.) 120 Pac. 1.

From the first of these cases (**Hot Springs Co. v. McMillan**) counsel argues that the release in the case at bar is **void** because there was some proof of a custom to pay injured men half time. There was no such ruling in the case cited. In the **Hot Springs** case, **fraud was pleaded** and the court held that testimony tending to show a custom of the company to continue the wages of disabled employes was admissible under the allegation of the pleadings that **“the alleged release was fraudulent and that when he signed same he did so under the impression that he was signing a receipt for money due.”**

We do not dispute that when fraud, duress, mistake or the like is pleaded a different rule obtains. In the case at bar **fraud was not pleaded** nor even suggested until now. Here there is nothing more or less than an attempt to contradict a written release by parol testimony of an entirely different agreement. Furthermore, there was nothing said in the **Hot Springs** case from which to draw the conclusion that the release was **void**. The court said that:

“While the testimony of McMillan on the question appears to us to be weak

and contradictory, yet unless we overturn a long line of decisions of this court, we must hold that all these were matters for the jury to settle, and, as they were properly instructed, their decision is final."

The plaintiff had alleged in his reply that the release set up in the answer had never been signed by him, that he had signed a receipt, that an agent of the defendant had substituted the release.

"Which he had refused to sign, for the receipt which he had agreed to sign, and which he intended and believed he was signing."

How counsel can, from that decision, reason that the release in the case at bar is **void** is more than we can understand. Parker did not even know, at the time he signed the release, that in making settlements, the company usually paid half time. He testified:

"A. Well, I never had any—I never had any idea to know what they did settle for. I never had any trouble with the company or never had anything to do with it one way or the other.
Q. Well had you made inquiries or found out how they had settled with other people?

A. No, I never.

Q. Didn't you understand they usually gave a fellow half time when off.

A. No, I didn't know anything about it.

Q. Never heard that?

A. I have since that." (Tr. p. 124)

Parker also read over the release before signing it. He testified:

"Q. You read this over before you signed it, didn't you?

A. Which?

Q. This written statement I have just put in evidence?

A. Yes, sir. (Tr. p. 131)

That Parker was not telling the truth is evidenced by his contradictory statements. As just pointed out, he had testified (Tr. p. 124) that he had never heard of the custom to pay half-time until after he made the settlement. This is directly contradicted by his later testimony, in which he says:

"Q. How did you arrive at that amount, \$410.75?

A. He figured up the time I had lost, split my wages in the middle.

Q. Called it half time?

A. Called it half time.

Q. And what did you add to that?

A. Didn't add anything to it.

Q. Didn't add anything to it. They paid the doctor \$175?

A. Yes, sir.

Q. They paid that too, did they?

A. They had paid that beforehand."

Evidence of a custom of this kind has been distinctly held to be not admissible to avoid a written release. A case exactly in point is:

**Ogden v. Philadelphia & W. C. Traction Co.,
52 Atlantic, Rep. 9.**

This case was decided by the Supreme Court of Pennsylvania. The plaintiff had been injured and had executed a written release (set forth in full in the opinion) in consideration of \$20, and an agreement to pay him \$1.50 for each day he was confined to the house. Later on he brought an action, alleging, as does Parker in this case, that the company, at the time he signed the release, orally agreed to **employ him for the rest of his life**. The court held that the fact that the company followed its usual custom of giving the plaintiff light employment at \$1.50 per day after he got out of the house was not evidence of a contemporaneous oral agreement to employ him for life; and that the written release could not be avoided by evidence of such alleged contemporaneous parol agreement.

Another point decided in this Pennsylvania case which has not been raised here, because it seems wholly unnecessary to do so, in view of the discussion of the parol evidence rule, is that **any such oral contract as Parker claims is too indefinite to be enforced**.

Concerning this the Pennsylvania court said, (52 Atl. at p. 12):

“The place he was to fill was not to be determined alone by his judgment or his taste or his whims. There is no

provision in the alleged oral agreement for determining the precise nature of his employment. No surgeon or examining board was provided to pass upon his physical vigor. Neither he nor the company was named as having the right to determine the character of his employment. The contract was one incapable of enforcement, because of utter want of precision in its terms; and for that reason, as well as for the first one given, a verdict should have been directed for defendant."

The other additional authority cited by counsel for defendant in error (*Jackson v. Pac. Coast Condensed Milk Co.*, 120 Pac. 1) merely holds that where there was a contract of employment containing a provision that 50 cents should be deducted each month for a Hospital Fund, and the employer had no hospital, and did nothing to furnish an injured employe needed medical attention, he was justified in seeking proper medical aid and the company was liable therefor. The court held, however, that **the amount in the hospital fund was the limit of such liability**. In the case at bar there was nothing said of any "hospital fund."

Parker paid a dollar a month for the services of Dr. Dix and was given what he paid for. (Tr. p. 105)

The case of *Miller vs. Beaver Hill Coal Co.*, 48 Ore. 136, 85 Pac. 502, is nearer in point. There it was held that—

“The transaction, therefore, under the testimony, constituted in law nothing more than a subscription by the plaintiff and the other employes, for the charitable purpose of maintaining a hospital, where they could obtain such medical attendance and hospital accommodations as the fund thus subscribed would afford. And the only liability assumed by the defendant in collecting the fund was to expend it **for the purpose for which it was subscribed, and no other.** The mere fact that it received or exacted the contribution did not impose upon it the absolute duty to furnish each contributor all the medical or surgical attendance he might need or require, whether the fund provided was sufficient or not. A sick or injured employe was entitled to the use and benefit of the hospital and the medical services there provided, to the extent of the money contributed for that purpose, but he was not obliged to go to the hospital or to accept the accommodations. He could, if he chose, go elsewhere and employ physicians and attendants other than those provided by the company, and, if he did so, the company **would not be liable to reimburse him therefor.** The only duty of the

company was to use ordinary care in the expenditure of the money and in the employment of physicians and surgeons in charge of the hospital, and it is not responsible for the negligence of the surgeon so employed in going away and leaving the hospital in charge of another.

Miller vs. Beaver Hill Coal Co.

48 Ore., 136, 85 Pac. 502.

Citing Union Pac. Ry. Co. vs. Artist.

60 Fed., 365; 9 C. C. A. 14.

and other cases.

Therefore, in the case at bar, there was no liability to pay the \$175 to a physician privately employed by Parker.

But what if there was a liability? The intent and purpose of the settlement was, that in consideration of the payment of the sum named, Parker released the company from that liability, and all other liability arising out of the transaction. It might as well be argued in any case where a settlement is made between employer and employe for personal injuries that the settlement is void and without consideration because there was a liability on the part of the employer.

We wish to call the attention of the court to a few additional authorities on the general proposition for which we are contending, namely that a written release in compromise and settlement of unliquidated damages cannot be varied by parol. In a late

Mississippi case the release was in the form of a receipt, and was as follows:

“New Orleans, La., Aug. 4, 1908.
I, the undersigned, William H. English, do hereby acknowledge to have this day received from the New Orleans & Northeastern Railroad Company, the Alabama & Vicksburg Railway Company, and the Alabama Great Southern Railroad Company, the sum of seven thousand dollars (\$7.000.00) paid to me in full satisfaction and settlement of all claims of every kind whatsoever that I have or may have against said companies, or either of them, because of the personal injury received by me in Meridian yards on or about the twentieth (20th) day of July, 1907, hereby giving full release, satisfaction and guarantee of every kind whatsoever. Signed in triplicate the 4th day of August, 1908.

Signed) William H. English.

Witness:

(Signed) H. B. Sargent.

(Signed) A. G. Tafts.”

In an action to recover on an alleged additional oral promise to furnish employment, the court held that such evidence was not admissible, that the instrument was not merely a receipt, as it contained a contract to receive the money named therein “in

full satisfaction and settlement;" and that the stipulation in writing was **contractual** and could not be varied by parol.

English vs. New Orleans & N. E. R. Co. 56 So. 665.

Citing Thompson v. Bryant, 75 Miss. 12; 21 So. 655; Bauer v. Lyons, 72 Miss. 932, 18 So. 428; and Cooke v. Blackburn, 58 Miss, 537.

In a recent Missouri case the paper referred to in the opinion as the "second paper" consisted of an account headed:

"St. Louis and San Francisco Railroad Company, to C. & A. J. Matthews, Dr."
with this following:

"In full settlement and satisfaction of all claims whatever kind and description, arising from or growing out of loss or damage to any and all kinds of property up to and including the 18th day of January, 1909, including buildings, corn and hay * * * \$800.00."

This account bears the approval and check marks of various officers of the railroad. Following these approvals is this:

"Received February 8th, 1909, of the St. Louis and San Francisco Railroad Company, eight hundred 00-100 dollars in full payment, release and discharge of above claim.

(Signed) C. and A. J. Matthews."
Regarding this document, the court said:

“We are unable to agree that this second paper referred to as having been introduced is a mere receipt. By its very terms, and as plain as language can make it, it is a contract, a release and discharge of all claims for damages and cannot be considered in any other light. It follows from this that parol evidence or evidence aliunde the paper itself can not be introduced to explain the meaning of its terms, unless the words used, that is to say, the words, ‘including buildings, corn and hay’ are latent ambiguities. If there is any latent ambiguity about these words in this release they are subject to the consideration of a jury or the court as a trier of fact and may be explained by parol evidence. It is useless to endeavor to invoke the doctrine applicable to latent ambiguities as applicable to these words, or to contend that these terms used are ambiguous. There is no ambiguity, latent or patent, in this instrument. It is plain and unmistakable in terms and not only needs no construction or interpretation but interprets itself.”

The court held that parol evidence was inadmissible to vary the terms of this writing.

Matthews vs. Phoenix Ins. Co. 140 S. W.
968.

We are not surprised at counsel's failure to submit any cases in point on the question of evidence involved herein, except the case of Pennsylvania Co. vs. Dolan, for the reason that, we are convinced, there are no other cases. That case stands alone and the case at bar is readily distinguishable even from that case by reason of the agreement as to the consideration being the **sole consideration**. In our main brief, at p. 19, we have submitted the case of Budro vs. Burgess, 83 N. E. 318, as an authority construing this term. In conclusion we desire to submit one more authority on this point, namely the case of

Hurr vs. Metropolitan St. Ry. Co. (Mo.) 124 S. W. 1057.

The release, in its essential parts, was as follows:

"Know all men by these presents, that we * * * **for the sole consideration** of four hundred and 0-100 dollars to us paid by the Metropolitan Street Railway Company, the receipt of which is hereby acknowledged, do hereby release and forever discharge" (here follows description of accident, injuries, etc.) "It is expressly understood and agreed that said sum of four hundred and 0-100 **is the sole consideration** of this release, and the consideration stated herein is contractual, and not a mere

recital; and all agreements and understandings between the parties are embodied and expressed herein."

It will be noted that the latter part of this release contained no "promise" such as seems to be required under the rule in *Pennsylvania Co. v. Dolan*. It is a mere statement of **the legal effect** of the first part of the instrument, which is almost identical with the instrument in the case at bar. The court said:

"It is not claimed that this compromise was tainted with any kind of fraud. By the express terms of the written contract, the consideration of \$400.00 paid to plaintiff is made to release and satisfy the entire cause of action, and is agreed to be contractual. Certainly plaintiff will not be heard to attack or in any manner to impugn this contract * * * We hold, however, that oral testimony is wholly incompetent to contradict or vary the terms of the written contract which, as we have stated, treats the consideration as a contractual subject, and not a mere recital."

Certainly the mere statement in the release that the consideration is contractual does not of itself make it so. Except for this statement the release

is no stronger or better than the one in the case at bar. Both use the words, "sole consideration."

The judgment should be reversed.

Respectfully submitted,

JOHN D. GOSS,

Attorney for Plaintiff
in Error.

Herbert S. Murphy,
Of Counsel.

In The United States
Circuit Court of Appeals
for the Ninth Circuit

C. A. SMITH LUMBER MANUFACTURING COMPANY,
a Corporation,
Plaintiff in Error

v.

JOHN A. PARKER,
Defendant in Error,

Upon Writ of Error to the United States District Court
for the District of Oregon.

Petition for Re-Hearing

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Upon Writ of Error to the United States District Court
for the District of Oregon.

PETITION FOR RE-HEARING BY DEFENDANT IN ERROR.

The defendant in error respectfully petitions the court for a re-hearing of this cause on the following ground:

The court erred in its decision in not considering the statute of Oregon (Sec. 713, L. O. L.) upon which this case turned, and the construction given that statute by the Supreme Court of the State of Oregon, and rendering the decision herein contrary thereto.

The opinion of the court discloses that the court gave no consideration to either the statute of Oregon *upon which the case necessarily turns or to the construction given to that statute by the Supreme Court of Oregon.*

That the case turns upon a statute is apparent from the opinion of Judge Bean on the demurrer (p. 29, Transcript) and from the defendant's answer. Paragraph VIII of defendant's answer (p. 35, Transcript) is in part as follows: "and that the plaintiff is forbidden by the laws of the State of Oregon, and especially by Section 713, L. O. L., to vary the terms of said written agreement."

Section 713, L. O. L., reads as follows:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

" * * *

"2. * * * But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in Section 717, * * *."

And Section 717, L. O. L., to which the last section refers, is as follows:

"For the proper construction of an instrument, the circumstances under which it was

made, including the situation of the subject of the instrument, and of the parties to it, may also be shown so that the judge be placed in the position of those whose language he is to interpret.”

Although the statute of Oregon is little more than a crystallization of what had been the law prior thereto, yet *it is still a statute* and a construction of it by the Supreme Court of the state binds the Federal Court in all cases arising under the statute within the state. That statute was construed by the Supreme Court of Oregon in the case of *Holmboc v. Morgan*, 69 Ore. 395, points 2 and 3, p. 400; from which we quote :

“The order for the machine was in writing and signed by defendants Morgan and Howard, and the rule is that the terms of the writing cannot be varied by parol evidence; *but where the contract is not one required by the statute of frauds to be in writing, this rule is not violated by admitting evidence to establish the parts of the contract not contained in the writing. American Contract Co. v. Bullen Bridge Co.*, 29 Ore. 549, (46 Pac. 138) ; *Williams v. Mt. Hood Ry. & Power Co.*, 57 Ore. 251 (110 Pac. 490, 111 Pac. 17, Ann. Cas. 1913-A, 177.).”

“3. The evidence establishes that Morgan was to be taught to operate the machine. This was testified to by Morgan and admitted by Dunbar, and Mr. Johnson, the manager of Howard’s auto business, testified that, when a sale of a car is made, there is involved, although not specified in the order for the machine, a demonstration of the car and the making of the buyer

acquainted with it. This establishes the authority of the salesman to contract therefor. Although the instructions given were compensated by the agent's commission, yet it was a part of the contract of sale and to be furnished by the dealer, and, not being mentioned in the order for the machine, may be proved by parol. There was no error in admitting such proof. This decision disposes also of assignment No. 5."

(The italics are ours.)

Judge Bean took a similar view in his decision, as he cited the *Holmboe v. Morgan* case in his opinion. (See page 31, Transcript.)

And that the Oregon court does not stand alone in its construction of that statute is apparent from *Julliard v. Chaffee*, 92 N. Y. 535, where it was said:

"A party sued by his promisee, is always permitted to show a want or failure of consideration for the promise relied upon, and so he may prove by parol that the instrument itself was delivered even to the payee to take effect only on the happening of some future event (*Seymour v. Cowing*, 1 Keyes, 532; *Benton v. Martin*, 52 N. Y. 570; *Eastman v. Shaw*, 65 Id. 522), or that its design and object were different from what its language, if alone considered, would indicate. (*Denton v. Peters*, L. R. 5 Q. B. 474; *Blossom v. Griffin*, 3 Kern. 569; *Hutchins v. Hebbard*, 34 N. Y. 24; *Seymour v. Cowing*, *supra*; *Barker v. Bradley*, 42 N. Y. 316; 1 Am. Rep. 521; *Grierson v. Mason*, 60 N. Y. 394; *De Laralette v. Wendt*, 75 Id. 579; 31 Am. Rep. 494.) He may also show that the instrument relied upon was executed in part performance only of

an entire oral agreement (Chapin v. Dobson, 78 N. Y. 74; 34 Am. Rep. 512), or that the obligation of the instrument has been discharged by the execution of a parol agreement collateral thereto (Crossman v. Fuller, 17 Pick. 171), or he may set up any agreement in regard to the note which makes its enforcement inequitable." (Italics are ours.)

Jones on Evidence (pocket edition of April, 1912), Sec. 440, states the rule thus: "If the contract is one *required by law to be in writing, it must be complete in itself,*" citing many cases in support of the text.

Certainly, this court is bound by the decision of the State Supreme Court construing a state statute and we respectfully urge that we are entitled to have the points raised by this petition definitely decided. Because, if this court shall refuse to follow the decision of the Supreme Court of the state in construing a statute, we will, under the decisions, be entitled to *certiorari* from the Supreme Court. And therefore, we earnestly petition this court (a) for a rehearing of this cause, and (b) that the court pass upon the question raised in our brief and decided by the lower court and raised by the plaintiff in error's answer.

Respectfully submitted,

WM. T. STOLL,

Marshfield, Oregon,

ISHAM N. SMITH,

Portland, Oregon,

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THOMAS ANDREWS, *alias* THOMAS J.
MURPHY, and GEORGE POOLE, *alias*
GEORGE MOORE,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
First Division.

Filed

JAN 13 1915

United States
Circuit Court of Appeals
For the Ninth Circuit.

THOMAS ANDREWS, *alias* THOMAS J.
MURPHY, and GEORGE POOLE, *alias*
GEORGE MOORE,
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UNITED STATES OF AMERICA.

*District Court of the United States, Northern
District of California, First Division.*

CLERK'S OFFICE.

No. 5345.

UNITED STATES OF AMERICA

vs.

THOMAS ANDREWS, *alias* THOMAS J. MUR-
PHY, GEORGE POOLE, *alias* GEORGE
MOORE, CHARLES BENTON and CHUNG
KAW,

Defendants.

Praeipie [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please make return on writ of error in above cause by transmitting to the Clerk of the United States Circuit Court of Appeals, Ninth Judicial Circuit, a true copy of the record, opinion or opinions of the Court, bill of exceptions, assignment of errors, and all proceedings in the above-entitled cause under your seal particularly including indictment, plea, minutes of trial, verdicts impaneling jury, orders, motions to set aside verdicts, for new trial and in arrest of judgment, affidavits, sentence, judgment, transcript, petition for writ of error, order allowing writ of error, assignment of errors, supersedeas bond, bond for costs, bond of George Poole, bond of Thomas J. Murphy, writ of error. All of the above to be transmitted to and lodged with the Clerk of said Cir-

cuit Court of Appeals within Thirty (30) days from the 18th day of November, 1913.

Dated this 19th day of November, 1914.

WM. F. ROSE,

BRUCE GLIDDEN,

Attorneys for Defendants.

[Endorsed]: Filed Nov. 19, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

Indictment.

In the District Court of the United States, in and for the Northern District of California, First Division.

At a stated term of said Court begun and holden at the City and County of San Francisco within and for the State and Northern District of California on the second Monday of July in the year of our Lord one thousand nine hundred and thirteen,—

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: THAT

THOMAS ANDREWS, *alias* Thomas J. Murphy, GEORGE POOLE, *alias* George Moore, CHARLES BENTON, and CHUNG KAW, hereinafter called the defendants, heretofore, to wit, on the first day of May in the year of our Lord one thousand nine hundred and thirteen, at the City and County of San Francisco in the State and Northern District of California then and there being, did then and there knowingly, wilfully, wickedly, unlawfully, corruptly and

*Page-number appearing at foot of page of original certified Record.

feloniously, conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jurors aforesaid, unknown, to commit an offense against the United States,

Violation
Sec. 37,
C. C. U. S.,
and Act
Feb. 9, 09.

that is to say:

They, the said defendants, did, at the time and place aforesaid, knowingly, wilfully, unlawfully, wickedly, corruptly and feloniously conspire, combine, confederate and agree together and with said divers other persons whose names are, as aforesaid, to the Grand Jurors unknown, to wilfully, unlawfully, feloniously, fraudulently [2] and knowingly import and bring into the United States from Mexico, by way of El Paso, Texas, thence to the city of San Francisco, in the State and District aforesaid, and assist in so doing, certain opium and certain preparations and derivatives thereof, to wit, a large amount of opium prepared for smoking purposes, the exact amount of which is to the Grand Jurors aforesaid, unknown, and for that reason not herein set forth, contrary to law.

That said conspiracy, combination, confederation and agreement between the said defendants and the said divers other persons whose names are, as aforesaid, to the Grand Jurors unknown, was continuously throughout all of the time from and after the said first day of May, in the year of our Lord one thousand nine hundred and thirteen, and at all of the times in this count of this indictment mentioned and referred to, and particularly at the time of the commission of each and all of the overt acts in this count of this indictment hereinafter set forth, in existence

and process of execution.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said CHARLES BENTON, GEORGE POOLE, *alias* George Moore, and THOMAS ANDREWS, *alias* Thomas J. Murphy, on the eleventh day of September, 1913, brought from El Paso, Texas, to the City and County of San Francisco in the State and Northern District of California, two trunks containing opium illegally imported into the United States.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said [3] conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said THOMAS ANDREWS, *alias* Thomas J. Murphy, on the fifteenth day of September, 1913, delivered to Chung Kaw in the store of Quong Fat Chong Co. at number thirty Waverly Place in the City and County of San Francisco, in the State and Northern District of California, a quantity of contraband opium.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said THOMAS ANDREWS, *alias* Thomas J. Murphy, on the seventeenth day of September, 1913, took from the home of Charles Benton at number 1346A Stevenson Street in the City and

County of San Francisco in the State and Northern District of California, two trunks used by the defendants herein for smuggling opium, and left the said trunks in the keeping of one William Roberts at number 61 Duboce Avenue, in the City and County of San Francisco, State and District aforesaid.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said THOMAS ANDREWS, *alias* Thomas J. Murphy, on the thirteenth day of September, 1913, purchased a railroad ticket from Trinidad, in the State of Colorado, to the City and County of San Francisco in the State and Northern District of California, for which he paid the sum of forty-four dollars and twenty [4] cents (\$44.20), and excess on baggage containing opium the sum of seventeen dollars and two cents (\$17.02).

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

THOMAS ANDREWS, *alias* Thomas J. Murphy, GEORGE POOLE, *alias* George Moore, CHARLES BENTON, and CHUNG KAW, hereinafter called the defendants, heretofore, to wit, on the first day of May, in the year of our Lord one thousand nine hundred and thirteen, at the City and County of San

Francisco in the State and Northern District of California then and there being, did then and there knowingly, wilfully, wickedly, unlawfully, corruptly and feloniously conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jurors aforesaid, unknown, to commit an offense against the United States, that is to say:

They, the said defendants, did, at the time and place aforesaid, knowingly, wilfully, unlawfully, wickedly, corruptly and feloniously conspire, combine, confederate and agree together and with said divers other persons whose names are, as aforesaid, to the Grand Jurors unknown, to wilfully, unlawfully, feloniously, fraudulently and knowingly receive, conceal and facilitate the transportation and concealment after importation, certain [5] opium and certain preparations and derivatives thereof, to wit, a large amount of opium prepared for smoking purposes, the exact amount of which is to the Grand Jurors aforesaid, unknown, and for that reason not herein set forth, contrary to law, and which said opium prepared for smoking purposes would be, as each of the defendants then and there well knew, opium which had been theretofore imported into the United States contrary to law, from Mexico by way of El Paso in the State of Texas, thence to the City of San Francisco in the State and District aforesaid.

That said conspiracy, combination, confederation and agreement between the said defendants and the said divers other persons whose names are, as aforesaid, to the Grand Jurors unknown, was continu-

ously throughout all of the time from and after the said first day of May, in the year of our Lord one thousand nine hundred and thirteen, and at all of the times in this count of this indictment mentioned and referred to, and particularly at the time of the commission of each and all of the overt acts in this count of this indictment hereinafter set forth, in existence and process of execution.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said CHARLES BENTON, GEORGE POOLE, *alias* George Moore, and THOMAS ANDREWS, *alias* Thomas J. Murphy, on the eleventh day of September, 1913, brought from El Paso, in the State of Texas, to the City and County of San Francisco in the State and Northern District of California, two trunks containing opium illegally imported into the United States. [6]

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said THOMAS ANDREWS, *alias* Thomas J. Murphy, on the fifteenth day of September, 1913, delivered to Chung Kaw in the store of Quong Fat Chong Co., at number thirty Waverly Place, in the City and County of San Francisco, in the State and Northern District of California, a quantity of contraband opium.

And the Grand Jurors aforesaid, on their oaths

aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said THOMAS ANDREWS, *alias* Thomas J. Murphy, on the seventeenth day of September, 1913, took from the home of Charles Benton at number 1346A Stevenson Street in the City and County of San Francisco, in the State and Northern District of California, two trunks used by the defendants herein for smuggling opium, and left the said trunks in the keeping of one William Roberts at number 61 Duboce Avenue, in the City and County of San Francisco, State and District aforesaid.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further state: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said THOMAS ANDREWS, *alias* Thomas J. Murphy, on the thirteenth day of September, 1913, purchased a railroad ticket from Trinidad, in the State of Colorado, to the City and County of San Francisco in the State and Northern District of [7] California, for which he paid the sum of forty-four dollars and twenty cents (\$44.20), and excess on baggage containing opium, the sum of seventeen dollars and two cents (\$17.02).

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

BENJAMIN L. McKINLEY,
United States Attorney.

Names of witnesses appearing before the Grand Jury: Melville F. Stevens, Harry F. Walsh, Lee G. Dean, Joseph Head, Ray Mustard, Wm. H. Blaney, William Roberts, Martin Baker, Wm. H. Tidwell, E. E. Enlow, Chas. W. Dixon, Mary Nelson, Dosh Katona, R. H. McCormick, G. R. Schmalle, Maud Fay, Geo. Cassidy, Capt. J. T. Stone, John Toland, A. E. Carrere, Louise Loraine, Agnes Berrier, John W. Smith, John H. Davison.

[Endorsed]: A True Bill. John R. Hanify, Foreman Grand Jury. Presented in Open Court and Filed Oct. 7, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [8]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 8th day of October, in the year of our Lord, one thousand, nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5345.

UNITED STATES

vs.

THOMAS ANDREW, *alias*, etc., and GEORGE POOLE, *alias*, etc.

Pleas of Defendants.

The defendants being present in open court with their counsel, each of said defendants was then and there duly arraigned upon the indictment herein

against him, to which said indictment each defendant then and there pleaded not guilty, which said plea was by the Court ordered and is hereby entered. Further ordered that the order heretofore entered fixing bail of each of said defendants in the sum of \$2,000 be, and the same is hereby vacated and bail be and the same is hereby fixed in the sum of \$5,000 as to each of said defendants. Case continued until October 11, 1913, to be set for trial. [9]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 20th day of November, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5345.

UNITED STATES

vs.

THOMAS ANDREWS and GEORGE POOLE.

Impanelment of Jury, etc.

The defendants herein being present in open court with their counsel, Messrs. George E. Price, Archie Campbell and Wm. J. Danford on motion of the U. S. Atty., by the Court ordered that the trial of this case do now proceed; the defendants thru their counsel made a motion to withdraw their pleas of not guilty heretofore entered herein and interpose a demurrer to the indictment, which said motion was by

the Court denied. The following named jurors were duly drawn, sworn, examined and impaneled to try this case, to wit: Thomas C. Maher, Thos. A. Burns, Martin O'Connell, John T. Gilmartin, John Reid, R. E. Herdman, J. M. Taft, Albert N. Meals, H. L. Stilwell, B. G. Allen, Wm. F. Murrya, and A. Christianson.

The Government excused Fred Becker a juror drawn.

The defendants excused the following jurors drawn: Fred G. Ganter, F. H. Babb, Chas. R. Nauert.

Thereupon the further trial of this case was continued until to-morrow at 10 o'clock A. M. [10]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 21st day of November, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#5345.

UNITED STATES

vs.

THOMAS ANDREWS and GEORGE POOLE.

Minutes of Trial.

The defendant herein with their counsel and the jury sworn to try the case being present in open court, the further trial of this case was resumed. Mr. Selvage, Asst. U. S. Atty., called Harry F.

Walsh, Joseph Head, Fred West, John H. Dawson, Herman A. Kellum (interpreter), Raphael Manzo, Guillermo McAlpine, J. E. Benton, Charles R. Miller, who were each duly sworn and examined on behalf of the Government, and recalled Joseph Head, and called Charles W. Dixon, George Cassidy, Miss Marie Nelson, who were each duly sworn and examined on behalf of the Government and recalled Joseph Head, and called John Endicott Gardner (interpreter), and Louie Sang, who were each duly sworn and examined. The Government introduced certain exhibits which were marked from 1 to 22 inclusive. The further trial was then continued until to-morrow at 10 o'clock A. M. [11]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 22d day of November, in the year of our Lord, one thousand nine hundred and thirteen. Present: the Honorable M. T. DOOLING, Judge.

#5345.

UNITED STATES

vs.

THOMAS ANDREWS and GEORGE POOLE.

Minutes of Trial.

The defendants with their counsel and the jury sworn to try this case being present in open court the further trial of this case was resumed. Mr. Selvage

called F. W. Lynch, who was duly sworn and examined and recalled Fred West, Rafael Manzo who were each further examined, and called R. H. McCormick, and Dash Katoni, who were each sworn and examined. R. H. McCormick recalled. Maud Fay, F. G. Samally, Louise Loraine, John W. Smith, John T. Stone, Wm. Roberts, Martin Baker, B. O. Huffeker, each duly sworn and examined as witnesses on behalf of the Government. The Government introduced certain exhibits which were marked U. S. Exhibits #23 to #30, inclusive. Mr. Price recalled Louie Sang, as a witness on behalf of defendant, and called B. M. Sanaues, A. Habberly, who were sworn and examined for defendant. Mr. Selvage called E. E. Enlow, who was sworn and examined in rebuttal. The case was then argued by respective counsel. The Court charged the jury, who at 5:20 o'clock P. M., retired to deliberate upon their verdict and at 5:50 o'clock P. M., returned into court, and upon being asked if they had agreed upon a verdict each said they had and then and there rendered the [12] following verdict in writing, which was by the Court ordered recorded, and each juror responded upon being asked if that was his verdict, that it was, viz.: "We, the Jury, find Thomas Andrew, *alias* Thomas J. Murphy, the defendant, at the bar, Guilty on all counts: We, the jury, find George Poole, *alias* George Moore, the defendant, at the bar, Guilty on all counts." By the Court ordered that defendants be remanded to the custody of the U. S. Marshal. Further ordered that said defendants appear for judgment on Nov. 29, 1913. [13]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 5345.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS ANDREWS, *alias* THOMAS J. MUR-
PHY and GEORGE OLIN POOLE, *alias*
CHARLES MOORE,

Defendants.

Bill of Exceptions of Defendants.

BE IT REMEMBERED, that on the 20th day of November, 1913, the above-entitled cause came on for trial before the above-entitled court, the Honorable Maurice T. Dooling, Judge presiding. The plaintiff appearing by Benjamin McKinley, Esq., United States Attorney and T. H. Selvage, Esq., assistant United States Attorney and defendants Thomas Andrews, *alias* Thomas J. Murphy and George Olin Poole, *alias* Charles Moore, appearing by Messrs. George E. Price, Archie Campbell and William G. Danforth.

WHEREUPON, the following proceedings were had:

Mr. PRICE.—May it please the Court after the pleas of not guilty of defendants Murphy and Poole, both Mr. Danford and I came into the case, and at this time we ask permission to withdraw the pleas

merely for the purpose of interposing a demurrer to the indictment.

The COURT.—The motion is denied.

Mr. PRICE.—Exception.

THEREUPON a jury in the above-entitled court was regularly impaneled to try the same, and the cause was thereupon regularly [14] continued to the 21st day of November, 1913, for trial, whereupon the following proceedings took place:

Mr. DANFORD.—If your Honor please, yesterday, before impaneling the jury, Mr. Price, counsel for defendants asked for leave to withdraw the plea and to introduce a demurrer and assigned as the reason that counsel had come into the case subsequently to the plea, meaning himself and myself. Just to protect the record we wish to renew the motion at this time, not for that reason but for the reason that the indictment is faulty, jurisdictionally faulty. We ask now for the privilege of making that motion, and we would like to have a ruling.

The COURT.—The motion will be denied.

Mr. DANFORD.—We note an exception.

Testimony of Harry F. Walsh, for the Government.

HARRY F. WALSH, called for the United States, sworn.

Mr. SELVAGE.—Q. Your name is Harry F. Walsh? A. Yes, sir.

Q. Where do you reside?

A. 925 Alabama Street.

Q. What is your business or occupation?

A. Police Officer of the City and County of San Francisco.

(Testimony of Harry F. Walsh.)

Q. You reside in this city? A. I do.

Q. How long have you been occupying the position you have mentioned?

A. Going on 11 years; 10 years past.

Q. Do you know the defendants here, Poole and Murphy? A. Murphy, I do.

Q. Where did you first see those men?

A. Where did I first see Murphy?

Q. Yes.

A. At 30 Waverly Place, in Chinatown.

Q. In Chinatown, San Francisco?

A. Yes, sir; in the back room with a Chinese.

Q. State how you came to be there, and what you did when you were on [15] the premises and how you came to find him?

A. It was through arresting Chinese for violating the State Poison Law, smoking opium; we would always ask them where they bought their opium, we always wanted to get at the head of it, and we would—

Mr. PRICE.—Just a moment. We object to that, if your Honor please, as calling for hearsay.

The COURT.—Yes.

Mr. SELVAGE.—Q. State what you did.

A. We entered there, under a search warrant, to search the premises for opium.

Q. And did you go to this building? A. I did.

Q. How many rooms were there on the floor that you went to?

A. There was a store or a room or office, with tongued and grooved boards, back from the front of

(Testimony of Harry F. Walsh.)

the store, with two rooms in back of this little office, and a kitchen in back of that.

Q. That is No. 30 Waverly Place?

A. 30 Waverly Place.

Q. And it is in the City and County of San Francisco? A. Yes, sir.

Q. And in the State and Northern District of California? A. Yes, sir.

Q. How did you find the doors of the rooms?

A. There was one door open, and the office was open. You could go into the kitchen, there was no door there. While I was searching there, myself and Officer Stevens, we came across these rooms. I tried to open one door twice, it was closed and locked; I walked back to the kitchen and Officer Stevens then knocked on the door and asked for admittance; he knocked two or three times, I don't remember which it was, but it was twice anyhow—

Mr. PRICE.—Q. Are you reading from a memorandum, Officer Walsh?

A. No, sir, I am not. These are papers that I found there.

Q. Well, are you reading from them?

A. No, sir, I am not; I [16] can put them down any place.

Mr. SELVAGE.—Q. State whether or not you broke in the door.

A. Officer Stevens, after asking for admittance from all present and was refused, and the Chinamen would not open the door he kicked it in.

Q. Who did you find there?

(Testimony of Harry F. Walsh.)

A. He called me and said, "There is a white man in the room, with a Chinaman there. It was Murphy.

Q. How large a room was that?

A. It was a room, I should judge, about 8 by 8.

Q. What furniture, if any, was in it?

A. There was a bunk, such as the Chinese use, set up on horses or boards, with a mattress and clothes on top of it.

Q. Was it a regular Chinese bed? A. Yes, sir.

Q. Who else besides the defendant Murphy was there?

A. Chang Kow, a Chinese, one of the partners in the store.

Q. Did you have any conversation after you broke into the room? A. Yes, sir.

Q. What conversation did you have?

A. The partner was talking first to Officer Stevens and then—

Mr. PRICE.—We object to that, your Honor, let the witness tell what he knows himself and not what Officer Stevens said.

The COURT.—Q. You heard it? A. Yes, sir.

The COURT.—Proceed.

A. (Continuing.) He was talking to the Chinese and Murphy about who threw the papers on the floor; these were the papers and the keys. There was another set of keys but the Chinese got them back since. He asked them who owned the papers, and they both denied the ownership of the papers and the keys. He said to me, "Harry, I found these papers on the floor, and the keys, they look like white men's

(Testimony of Harry F. Walsh.)

paper, and there are keys here, I suppose one belongs to [17] the Chinese, the white man denies ownership of these papers."

Mr. DANFORD.—If your Honor please, we object to this testimony unless it is shown that the defendants and each of them were there.

The COURT.—It is shown that one was there.

Mr. DANFORD.—Will your Honor hold that that will bind both defendants?

The COURT.—It binds one; you cannot exclude testimony that binds one simply because it does not bind the other.

Mr. SELVAGE.—Q. Proceed with your statement.

A. He said, "He denies ownership of the papers, Harry. I found a paper corresponding to those on the floor in the white man's pocket; this is the paper here, the first one."

Q. Which paper is that?

A. Officer Stevens signed his name on the paper. We found all these papers there.

Q. You found this paper in whose pocket?

A. Officer Stevens found it in Murphy's pocket.

Q. And you say it was similar to the others you found on the floor?

A. That Officer Stevens picked up off the floor.

Q. This notation on the outside was not on the paper, was it? A. No, sir, it was not.

Q. It is simply a notation of the officer to identify the paper, is it?

A. I don't know who wrote that on there. Ste-

(Testimony of Harry F. Walsh.)

vens' name is signed on the paper that he found in Murphy's pocket; he wrote it in ink.

Mr. SELVAGE.—At this time I offer, for the purpose of identification, a deposit slip on the Bank of Salt Lake City, Utah, Walker Brothers, Bankers.

Mr. PRICE.—I do not believe it is proper to read it into the record at this time. We have no objection to its being marked. [18]

Mr. SELVAGE.—I am not reading it; I am simply identifying it and offering it for identification at this time. I ask to have it marked "United States Exhibit 1 for Identification."

(The document was here marked "U. S. Exhibit No. 1 for Identification.")

Q. Did you find other similar papers under the bed or in the room?

A. Officer Stevens picked up all the papers and had them in his hand when I came in the room.

Q. When you came in the room? A. Yes, sir.

Q. Did he have a conversation with the defendants, in your presence, regarding these papers?

A. He did, sir.

Q. State what else occurred there after these papers, after this paper was found in the pocket of Mr. Murphy?

A. We were asking him if they were not his papers, and he said no, they were not; we asked the Chinese whose papers they were and he said they belonged to the man who went out. Then we asked Murphy what he was doing in there with the Chinese in the room, closed up in the room, and the room

(Testimony of Harry F. Walsh.)

locked, and he told us he came in to play a Chinese Lottery. I said, "They don't play Chinese lottery in here, at least they never did to my knowledge and I have been in Chinatown a good many years off and on"; and he said, "Well, this man places the ticket for me and I go and play it."

Q. Was there any further conversation had in the room?

A. We talked about the papers. I do not remember all of the conversation. We asked him, the last thing before we left the room if these were his papers, and he denied ownership of the papers or the keys.

Q. Are these two bunches of keys the keys you found in the room? A. Yes, sir.

Q. Where were they with reference to the men?
[19]

A. When I first seen them Officer Stevens had them in his hand.

Mr. SELVAGE.—I will introduce these keys for identification and ask that the two bunches be fastened together and marked Government's Exhibit 2 for Identification.

(The keys were here marked "U. S. Exhibit 2 for Identification.")

Q. All of the papers you have here were found there in the room, were they? A. Yes, sir.

Q. State whether or not they were fastened together or how they were.

A. They were scattered. There were a few under the bunk and a few on the floor. Stevens was pick-

(Testimony of Harry F. Walsh.)

ing up the last few under the bunk when I came in the room.

Mr. SELVAGE.—I will offer these in evidence for identification and ask that they be marked Government's Exhibit 3 for Identification as the papers which were found in the room with the defendants Chang Kow and Murphy.

(The papers were here marked "U. S. Exhibit No. 3 for Identification.")

Q. Where did you take them from the room?

A. From the room we took them to a restaurant. They requested something to eat, both of them, and when they had their supper we took them over to Turk and Taylor, to a rooming-house.

Q. To Turk and Taylor, to a rooming-house?

A. Yes, sir.

Q. What was the name of the house?

A. It is at Turk and Taylor; I forget the name of it now. It used to be called the Riverside but it was changed to the Lenox, I think it is the Lenox. It is up over the Poppy Cafe, on the southeast corner.

Q. Did you go to any room? A. We did.

Q. What room?

A. Up on the third or fourth floor; I think it was 509—or 409—I think it was 509.

Q. Room 509 in the Lenox?

A. I think it is the Lenox. I have [20] forgotten the number of the room.

Q. Did Mr. Murphy say anything as to whose room it was? A. He said that he roomed there.

Q. From there where did you take them?

(Testimony of Harry F. Walsh.)

A. From there we took them down to the Ferry Building, in an office off from the Ferry Building, a Customs House office, the night inspector's office.

Q. When you were in the room, 509, if that is the room in the Lenox, did you see any person there other than the two defendants?

A. I seen a lady in there.

Q. Do you know what her name was?

A. Agnes Benier.

Mr. DANFORD.—Just a moment. During all the time you have testified to were both defendants present? You just answered both defendants.

A. Not Mr. Poole, but the Chinese and Murphy.

Q. Just one of these defendants?

A. Murphy.

Mr. SELVAGE.—Q. What, if anything, did Mr. Murphy say upon entering the room?

A. We did the first speaking; we asked the woman if he roomed there and she said he did not.

Q. What next was said?

A. We asked her if he had been up there and she said yes; we turned to him and said, "We thought you roomed here," and he said, "I do; I am up here pretty often." She said, "He only came up here two or three times and the last time he came he stayed all night."

Q. Was there anything else said by Murphy that you heard as to why he was arrested?

A. We told him, when we first took him out that we thought he was either a smuggler of Chinese or of opium; and the woman asked him what he was

(Testimony of Harry F. Walsh.)

arrested for and he said, "These officers say they are taking me down for smuggling," smuggling Chinese or opium; I don't know what it is he said.

Q. You say that after you left there you went to the Ferry Building? A. Yes, sir. [21]

Q. How long did you remain there?

A. We remained there I think an hour and a half or two hours. The night inspector, or captain of the watch, was making his rounds and we did not know when he would come back and so we telephoned out to Inspector Head's house and told him we had two men we would like him to take charge of and he came down and took charge of them.

Q. Did you say anything to him about arresting him for opium smuggling prior to this expression he made to Agnes Benier?

A. We were talking to him and telling him that we thought he was a Chinese smuggler or an opium smuggler or something; I believe I did, sir, to the best of my knowledge.

Q. After you reached the Ferry Building did you have any further conversation with him or with the Chinese?

A. We tried to get the Chinese—we asked the Chinese if these were not the white man's papers and keys, but he no sabbeed at all.

Mr. PRICE.—Were the defendants present at that time?

A. Murphy was present.

Q. Mr. Poole was not present? A. No, sir.

Mr. SALVAGE.—Q. What did you find in the possession of the Chinaman in the room where you

(Testimony of Harry F. Walsh.)

first arrested them?

Mr. CAMPBELL.—If your Honor please, we object to that as assuming something not in evidence; it has not been proven that there was anything found in the possession of the Chinaman.

The COURT.—If there was not anything found the witness can say so.

A. Officer Stevens searched the Chinese; I don't know what he found on the Chinese.

Mr. SELVAGE.—Q. Did you see any money there? A. I did.

Q. What money did you see? A. I seen \$1395.

Q. What character of money was it?

A. It was in bills, U. S. Government bills. [22]

Q. Do you know what the denominations were, whether large or small?

A. They were one-hundred dollar bills and some smaller.

Q. Who had the money when you first saw it?

A. Officer Stevens had it in his hand; he told me he took it off the Chinese.

Q. Did he tell you, in their presence, that he took it off the Chinese? A. Yes, sir.

Q. What was done with that money?

A. It was turned over to the Government officials, Mr. Tidwell and Mr. Wardell.

Q. Did either of them say anything about who that money belonged to or what it was for?

A. They would not tell us.

Q. They would not tell you? A. No, sir.

Q. Did you ask them? A. I did.

(Testimony of Harry F. Walsh.)

Q. There are some notations on some of these papers that have been introduced for identification here, "U. S. Exhibit No. 3"; I will ask you whether or not the notations that are here upon these papers were upon them at the time that you found them?

A. Yes, sir; they were. Those are the papers. There was a note-book there also amongst them.

Q. I will ask you whether or not this book is in the same condition now as it was when you found it. Just examine it and state.

A. Yes, sir, it appears to be in the same condition as when we found it.

Q. I will ask you whether or not after you reached the prison with Mr. Murphy he made any statement to you about these papers?

A. The next day he did.

Q. On the next day he did? A. Yes, sir.

Q. What did he say on the next day?

A. We asked him about the ownership of the papers and the keys; we were talking there for some time; I left Officer Stevens in conversation with him once when I went and tried to get him out in the corridor for a walk and they said they would let him out later when the misdemeanor prisoners [23] were locked up; then I went back there and then he admitted, in the presence of Officer Stevens and myself, the ownership of the keys and the papers, and that he threw them on the floor.

Q. Did he say anything as to the notations on the papers?

A. He said he was just figuring up certain things

(Testimony of Harry F. Walsh.)

out of his own mind, and he was figuring other things, just while sitting there waiting for the Chinaman to play his lottery ticket.

Q. Did he say anything about whether he had given that money to the Chinese, or the Chinese had given it to him? A. He did not.

Q. Did you have any further conversation with Mr. Murphy?

A. That was all, after that day in the prison.

Cross-examination.

Mr. DANFORD.—Q. At the time that you visited the room, and after leaving the Chinese quarters, is it not a fact that Mr. Murphy made the remark to you, “I don’t know what you have arrested me for, but I know you better take us to the station that I might talk to any attorney”? A. He did.

Q. And is it not a fact that he did not say anything about being arrested for opium or for smuggling, or for anything of the kind?

A. He did up in the corridor of the Hall; I distinctly heard him when the woman asked him what was the matter.

Q. You said he made a remark that he was there for the purpose of buying a Chinese lottery ticket?

A. He told us he was in there to play Chinese lottery tickets, yes, sir.

Q. Did he show you anything like that or did you see anything like that on him (showing)?

A. I did not, and we did not find anything like that on him.

(Testimony of Harry F. Walsh.)

Q. The papers that you have testified concerning, and which are marked for identification, were on the floor when you went in there? [24]

A. Part of them were on the floor and part of them in Officer Steven's hands, and the keys were in his hands.

Q. Did you find any of them at any time on the persons of the defendants, or either of them?

A. Officer Stevens informed me that he found one paper—

Q. (Intg.) Just a moment.

Mr. SELVAGE.—Q. In the presence of the defendant? A. In the presence of the defendant.

Mr. DANFORD.—That is all.

Redirect Examination.

Mr. SELVAGE.—Q. Do you know where Officer Stevens is?

A. Yes, sir. Sergeant O'Brien got a telegram from him this morning; he is coming down from Wilbur Springs.

Q. He will be here later?

A. I don't know when he will get in. The Sergeant got a telegram from him this morning that he will leave right away.

Testimony of Joseph Head, for the Government.

JOSEPH HEAD, called for the United States, sworn.

Mr. SELVAGE.—Q. What is your full name?

A. Joseph Head.

Q. Where do you reside, Mr. Head?

(Testimony of Joseph Head.)

A. 210 Ashbury Street, San Francisco.

Q. What official position, if any, do you hold with the United States Government?

A. Inspector of Customs.

Q. How long have you been occupying that position? A. Nearly 18 years.

Q. What designation do you have as to your office?

A. Captain of Inspectors.

Q. Do you know the defendants here, Mr. Poole and Mr. Murphy?

A. I know Mr. Murphy as having met him on September 17th. [25]

Q. Where did you meet him on September 17th?

A. I met him first on the evening of September 16th.

Q. Whereabouts?

A. At the Ferry assembly-room.

Q. Did you have any conversation with him?

A. I had a conversation the following day in Mr. Tidwell's office.

Q. Go on and state what that conversation was.

A. The conversation was in regard to where he roomed and where his trunks or baggage were.

Q. Did you have any conversation with him about coming from El Paso, Texas, to San Francisco?

A. I think he was asked that question but he denied he came from there.

Q. Where did he say he roomed?

A. At the Porter Hotel; he did not say he roomed any place, but he said he spent the previous night at that hotel.

(Testimony of Joseph Head.)

Q. That is the night before his arrest?

A. Yes, sir.

Q. What hotel is that, or where is it located? Is it the same as the Lenox? Is it the same hotel that was known as the Lenox before that?

A. I could not say.

Q. Where is it located?

A. It is either on Turk or on Eddy Street.

Q. Did you go there to see whether he was stopping there, or not? A. No, sir.

Q. Did he make any other statement to you?

A. He said he had a trunk which he had shipped from Helena, Montana, to some place in Kentucky.

Q. How did he come to mention it?

A. Upon questioning him.

Q. You asked him questions? A. Yes, sir.

Q. State whether or not you afterwards found any trunks here in the city that had been used for transporting opium?

Mr. PRICE.—One moment. We object to the question as [26] calling for the conclusion of the witness. The question is leading.

Mr. DANFORD.—He should state the facts, your Honor.

Mr. SELVAGE.—I will withdraw the question.

Q. Did you find any trunks in the city here after that, after having that conversation? A. Yes, sir.

Mr. DANFORD.—We object to that unless it is shown that it is connected with the defendants.

Mr. SELVAGE.—We will connect it with the defendants all right.

(Testimony of Joseph Head.)

The COURT.—I suppose they must connect them with the defendants or else the testimony will be stricken out.

Mr. DANFORD.—I suppose there are thousands of trunks in warehouses here in the city.

Mr. SELVAGE.—Well, this trunk was not recovered from a warehouse.

Mr. PRICE.—Never mind testifying, Mr. Selvage. You are not testifying now. Let the witness state the facts.

The COURT.—Gentlemen, just address your objections to the Court and I will pass upon them as best I can. This objection is overruled.

Mr. SELVAGE.—Q. Go on and state what course you pursued in finding these trunks, and where you found them, and so forth.

A. Do you wish the incidents leading up to the finding of them?

Q. Well, not necessarily; state whatever you did yourself and not what anybody said to you. State what you did and how you found them, and where you found the trunks. You can tell how you located them and where you found them?

A. I received from the custody of Mr. Walsh a certain registered mail receipt dated September 15, 1913, numbered 10052. From information secured from the postoffice this receipt for registered [27] mail was sent from 68 Duboce Avenue. I obtained a search-warrant for 68 Duboce Avenue and went out there and met Mr. Blum, two of them there are two brothers, and asked them regarding this receipt.

(Testimony of Joseph Head.)

Q. You need not state what they told you. Just go on and state what you learned and what you did.

A. From information received at this place I located three trunks at 59 and 61 Duboce Avenue.

Q. What was the character of the trunks, the general appearance of them?

A. Two of the trunks were usual trunks and one was a trunk that was rather exceptional in appearance, that is, it was a long trunk.

Q. Are the trunks here in the corridor, do you know? A. Yes, sir.

Q. Captain Head, state whether or not this is one of the trunks you found (referring to a long trunk).

A. Yes, sir.

Q. Just examine it and see whether it is in the same condition now as it was when you found it.

A. Yes, sir.

Q. Examine the inside and see whether or not it is in the same condition as when you found it.

Mr. McKINLEY.—Let the record show, Mr. Reporter, that the witness is opening the trunk with a key on the bunch of keys marked "U. S. Exhibit No. 2 for Identification."

Mr. SELVAGE.—Q. I will ask you first, Captain Head, what is the character of the lock on this trunk?

A. Corbin.

Q. Is it a common or an unusual key that you opened that trunk with?

A. The lock and key are very unusual for trunks.

Q. State whether or not the trunk is now in the same condition it was in when you found it.

(Testimony of Joseph Head.)

A. The only difference is that this was suspended on this strap. [28]

Q. That is, the little case inside was suspended on the strap? A. Yes, sir.

Q. Were these comforts or quilts or whatever you call them, in the trunk at the time? A. Yes, sir.

Q. State whether or not there were any stains upon the quilts at the time you found them, or on the comforts.

A. This comforter, I cut a sample from it containing a stain similar to this, and which I gave to a chemist.

Q. Was there any great quantity of it?

A. It was just scattered through the trunk, on the sides, and at different places.

Q. The witness is now shown certain mechanical devices or arrangements in the center of the trunk; it divides the trunk into two separate devices, the devices sliding up and down and having thumb screws to hold them in place; I will ask you whether or not the trunk was in the same condition and those devices are in the same condition now as when you found the trunk? A. Yes, sir.

Q. State whether or not you found any key to unlock the little case, this little case about 18 inches long and 10 inches deep and 12 inches wide that is found within the trunk here.

A. I did not try the keys on the trunk.

Q. You did not try a key on this little case?

A. No, sir.

Q. Among the keys that you found, state whether

(Testimony of Joseph Head.)

or not you tested them in the locks of the other trunks that were found?

A. No, sir, I did not test the keys; I can only swear to this one key that I opened the trunk with.

Q. Did you examine the other trunks?

A. Yes, sir.

Mr. SELVAGE.—Now, I will have another trunk brought in.

Mr. DANFORD.—Will counsel for the Government consent to the defendants taking a specimen of the stain? [29]

Mr. SELVAGE.—Certainly.

The WITNESS.—I will state, Mr. Selvage, that I only obtained stains—

Mr. PRICE.—We object to any voluntary statement.

Mr. SELVAGE.—Q. I desire you to proceed and state whatever you did about the trunk or about the stains.

A. We took stains from the sides of the trunk as well as from this piece here.

Q. You found stains upon the sides of the trunk?

A. Yes, sir.

Q. As well as upon the quilts? A. Yes, sir.

Q. State whether or not the stains were solid material, the same as this, that could be picked off.

A. Yes, sir.

Q. The same material? A. Yes, sir.

Mr. PRICE.—We would like to leave this little piece here at present, if your Honor please.

Mr. SELVAGE.—Q. I call the witness' attention

(Testimony of Joseph Head.)

to this other trunk. But before doing that I think I will have this long trunk introduced in evidence at this time as "United States Exhibit No. 4 in Evidence."

Mr. DANFORD.—We object to it, if your Honor please, upon the ground that there has not been anything shown by the Government connecting either one of these defendants with this trunk.

The COURT.—Except the key. That is about the only thing.

Mr. DANFORD.—There is nothing showing they had any possession of it, or any right, title or possession in it.

Mr. SELVAGE.—We will introduce it now for identification and we will introduce it in evidence a little later on.

Mr. DANFORD.—All right.

(The trunk was here marked "U. S. Exhibit No. 4 for Identification.")

Mr. SELVAGE.—Q. I will ask you whether or not the trunk [30] here which I will ask to have introduced for identification and marked U. S. Exhibit No. 5, was also found by you?

A. Yes, sir.

(The next trunk was here marked "U. S. Exhibit No. 5 for Identification.")

Q. Where did you find it?

A. At the same place, 59-61 Duboce Avenue.

Q. Did you open that trunk also? A. Yes, sir.

Q. State whether or not there were any stains at the time you opened it. A. Yes, sir.

(Testimony of Joseph Head.)

Q. State whether or not this trunk is now in the condition it was in at the time you found it.

Mr. DANFORD.—Just a moment. I want to ask the jury, through the Court, if the jury can see all of this trunk. It is material that they should see it.

Mr. SELVAGE.—I think they may examine the trunks; I think it would be well for them to examine them to their fullest desire.

Mr. DANFORD.—Yes, we want them to see the interior of the trunks, especially this long one.

Mr. SELVAGE.—Q. Answer the question please, Captain. A. Yes, sir, it is.

Q. And was this clothing in here? A. Yes, sir.

Q. State whether or not these pillows were in the trunk. A. Yes, sir.

Q. And the quilts or comforters, whatever you would call them? A. Yes, sir.

Q. I call the attention of the witness that I used one of the keys upon that ring in opening the trunk; state whether or not you ever opened the trunk with one of these keys. [31]

A. Another Government officer tried the keys.

Q. Was it in your presence? A. No, sir.

Mr. SELVAGE.—Let the record show that the key from the same ring opens this trunk “U. S. Exhibit No. 5.”

Mr. DANFORD.—We object to that. It has not been shown that this witness used this key on this trunk. Are we to conclude something from what this witness has said, or are we to try a number of keys and pick out a certain one.

(Testimony of Joseph Head.)

Mr. SELVAGE.—The purpose is to show that one of the keys on this bunch of keys, or this key-ring, was used to open the trunk. Mr. Murphy admitted that these were his keys. Also it is to demonstrate here in the courtroom that that key will open the trunk.

Mr. DANFORD.—The objection is withdrawn.

Mr. SELVAGE.—Q. Did you find another trunk?

A. Yes, sir.

Q. Where did you find it?

A. 59-61 Duboce Avenue.

Mr. SELVAGE.—I will have it brought in. Let the record show that the trunk now produced was unlocked by one of the keys found upon the ring admitted by Mr. Murphy to have been his keys, and in the presence of the jury.

Mr. DANFORD.—We object to that way of putting it in. Mr. Murphy has not been on the stand yet and has not admitted anything.

Mr. SELVAGE.—He admitted it to this witness.

Mr. DANFORD.—Then let the record show that the witness said that Mr. Murphy admitted it.

Mr. SELVAGE.—That is all right.

Q. State whether or not this is the trunk that you found. A. Yes, sir.

Q. And the same quilts or blankets or comforters, whatever they may be, were found in the trunk?

A. Yes, sir.

Q. And were these clothes also found there?

A. Yes, sir.

Q. And the ropes? A. Yes, sir. [32]

(Testimony of Joseph Head.)

Q. How about the shoes?

A. They were found in the trunk.

Q. And the tools that are in here were also found in it, were they? A. Yes, sir.

Mr. SELVAGE.—I will offer this trunk for identification, if your Honor please, and ask to have it marked U. S. Exhibit No. 6.

(The trunk was here marked “U. S. Exhibit No. 6 for Identification.”)

Q. I understand that you did not find any more trunks yourself personally? A. No, sir.

Q. State whether or not in your examination of the defendants or their effects you found any papers or memoranda?

A. In the trunk No. 5 I found this package of opium labels.

Mr. CAMPBELL.—We object to that, if your Honor please, as calling for the conclusion of the witness, whether they were opium labels.

The COURT.—Well, let that part of it go out. He found that package.

Mr. SELVAGE.—Q. You found this package, did you? A. Yes, sir.

Q. Is it in the same condition now, that is, as to quantity of labels? A. Yes, sir.

Q. It is a package of labels of some kind, is it not?

A. It has lettering on it.

Q. It has lettering on it showing what it is?

A. Yes, sir.

Mr. SELVAGE.—I want to call the attention of the jury to the fact that these labels have upon them,

(Testimony of Joseph Head.)

“Lai Chan, Prepared Opium.”

Mr. PRICE.—Have you offered them in evidence?

Mr. SELVAGE.—No.

Mr. PRICE.—We ask that that statement of the District Attorney be stricken from the record and the jury instructed to disregard it. [33]

The COURT.—Let it go out.

Mr. SELVAGE.—I offer it in evidence, your Honor.

Mr. DANFORD.—In evidence, or for identification?

The COURT.—It will take the same course as the others.

Mr. SELVAGE.—Yes, it will take the same course as the others. We ask to have it marked “U. S. Exhibit No. 7 for Identification.”

(The labels were here marked “U.S. Exhibit No. 7 for Identification.”)

Q. Where did you find those?

A. In the trunk number 5.

Q. Did you find any other documents or any other papers?

A. Do you mean in the trunks or at other places?

Q. Either from the defendants or from the trunks, or from any other source, state whether you found any documents.

A. In the search of the place that Mr. Walsh took me to, where he had taken Mr. Murphy into custody, I found this paper rolled in a wad under the bed.

Mr. SELVAGE.—At this time I will introduce in evidence this paper mentioned by the witness and

(Testimony of Joseph Head.)

which is endorsed "Walker Brothers, Bankers, Salt Lake City," and ask to have it marked U. S. Exhibit No. 8 for identification.

(The paper was here marked "U. S. Exhibit No. 8 for Identification.")

Q. You have some other papers there?

A. These are the check numbers of two trunks, which I received from Charles Dixon.

Q. Where did you find this?

A. Mr. Dixon gave me that as the check numbers for trunks delivered at the Thames Hotel, on September 11th.

Mr. SELVAGE.—I will ask that this be introduced, the same as the others for identification.

(The document was here marked "U. S. Exhibit No. 9 for Identification.")

Q. And what is this?

A. This is a card given me by Mr. Roberts in regard to the moving of a trunk to the Alcazar Hotel.
[34]

Mr. PRICE.—If your Honor please, we object to this. This seems to be a memorandum which somebody else has given to the witness.

Mr. SELVAGE.—We will connect them with the defendants.

Mr. DANFORD.—Then you put them in on the avowal that you will connect it?

Mr. SELVAGE.—Yes, otherwise we could not introduce these things.

(The document was here marked "U. S. Exhibit No. 10 for Identification.")

Q. What is this?

(Testimony of Joseph Head.)

A. This a card given me by Mr. Roberts on the arrival of the trunk.

Mr. SELVAGE.—I offer this in the same manner.

(The card was here marked “U. S. Exhibit No. 11 for Identification.”)

Q. What is this?

A. In the search of the place at 30 Waverly Place, where Mr. Murphy was found, I took some Chinese books; one of them is this book.

Mr. SELVAGE.—We offer this in the same way.

(The document was here marked “U. S. Exhibit No. 12 for Identification.”)

Q. State whether or not you examined the hotel register of the Hotel Thames.

A. Yes, sir, I examined it.

Q. Do you know the handwriting of the defendant Murphy? A. Fairly well.

Q. State whether or not you saw any handwriting upon that register that was similar to his and that you recognized as his? A. Yes, sir.

Q. What was the name you found?

A. A. J. Spencer.

Q. Have you the record here?

A. I think it is here.

Q. Do you know where the record is?

A. I gave it to Mr. Smith to give to Miss Nelson this morning.

Q. State whether or not you found in the book that was taken from Mr. Murphy an item regarding a railway ticket. [35] A. Yes, sir.

Q. Will you call attention to it?

Mr. PRICE.—If your Honor please, we object to

(Testimony of Joseph Head.)

this line of examination as leading the witness.

Mr. DANFORD.—We would not interpose this objection at this time, your Honor, except that there has been much of it.

The COURT.—The objection is overruled.

A. It is amongst those papers.

Mr. SELVAGE.—Q. I call your attention to “United States Exhibit No. 3 for Identification” and ask you as to the ticket I just mentioned?

A. I do not see it amongst these.

Q. State whether or not you saw it amongst any of those others that you have passed over to me.

A. No, it is not here.

Q. Then I will withdraw that question for the present time. We have the Register here now. I will return to that other matter a little later. State whether or not this is the Register that you found the name upon. A. Yes, sir.

Q. Which is the name that you have reference to?

A. The name of A. J. Spencer at the top of the page.

Q. On what date?

A. Thursday, September 11th.

Q. Of this year?

A. Of this year, 1913, yes, sir.

Mr. SELVAGE.—We will introduce this leaf for identification and ask to have it marked U. S. Exhibit No. 13 for Identification.

(The document was here marked “U. S. Exhibit No. 13 for Identification.”)

Q. State whether or not it was in this book at the time?

(Testimony of Joseph Head.)

A. Yes, sir. I saw them cut it out, and I was present when it was cut out.

The COURT.—What hotel is that?

A. The Hotel Thames.

Q. Where is that? Is it in this city?

A. Yes, sir. [36]

Mr. SELVAGE.—Q. Mr. Head, I will call your attention to some documents here, apparently tickets, and ask you if you have ever seen these before, and if you know where they came from?

A. I have seen this registered mail receipt.

Q. The registered mail receipt? A. Yes, sir.

Q. That is on the outside, is it? A. Yes, sir.

Q. Is this the receipt you spoke of a little while ago in your testimony? A. No, sir

Q. From what do you recognize this?

A. From the number and the date.

Q. What is the date? A. July 14, 1913.

Q. Where did you see that?

A. It was given to me by Mr. Walsh as one of the papers found at 30 Waverly Place.

Mr. DANFORD.—That is objected to as immaterial, irrelevant and incompetent; he did not see it in connection with these defendants. If they have someone who got it from them it must be introduced through that witness.

The COURT.—That is true.

Mr. SELVAGE.—I think the objection is good as to that part of it, and the part of the answer where the witness said it was handed to him as having been taken from the defendant, that part can be stricken out.

(Testimony of Joseph Head.)

Q. But it was handed to you by Mr. Walsh was it?

A. Yes, sir.

Q. Did you ever see any of these tickets before; that is, in connection with the case?

A. I saw them but without making any examination of them very closely.

Q. You made no examination of them yourself?

A. No, sir.

Cross-examination.

Mr. DANFORD.—Q. Mr. Head, have you seen anything in these trunks that were in them when you first saw them? A. I think so. [37]

Q. Are you certain there is not something that was in them when you first saw them and is not in them now, or is in them now?

A. There is a package of these labels that I took out. There are a number of articles in the trunk that I have not enumerated or spoken of.

Q. But you say that all that you saw in them when you first saw the trunks is still in them?

A. I think so.

Q. Now, please come down and examine this trunk; do you see anything in the trunk, anything like tin, or tin-cans of any kind? A. No, sir.

Q. Did you at any time ever see anything of that kind in this trunk?

A. No, sir, not in this trunk, referring to "Exhibit 4."

Q. Now, referring to "Exhibit No. 5," please examine this trunk and see if you find in it now everything that you first saw in it. You remember every-

(Testimony of Joseph Head.)

thing you saw in it, do you? A. Pretty well.

Q. Just look at it now and see if you find everything there that was there when you first saw it.

A. Just as I see them now, they were all there.

Q. This is one of the tin-cans that you saw?

A. Yes, sir.

Q. Is it in the same condition now as it was when you first saw it?

A. Except that I made a hole in the top of it.

Q. Did you have an order of court or any other order, to make a hole in the top of it? A. No, sir.

Q. Is it customary for you or for those working under you, to get what purports to be evidence and then change that evidence?

Mr. SELVAGE.—To that we object upon the ground that it is not proper cross-examination; it is calling for a custom.

Mr. DANFORD.—It is a part of what they found as an exhibit.

The COURT.—The objection is sustained. The question is what did he do?

Mr. DANFORD.—What did you do with reference to this?

The COURT.—Q. You punched a hold in it to find out what [38] was in it, didn't you?

A. Yes, sir, that is all.

Mr. DANFORD.—Q. Did you do the same thing with this? A. Yes, sir.

Q. Did you ascertain what was in both of these?

A. Yes, sir.

Q. What did you ascertain was in both of them?

(Testimony of Joseph Head.)

A. Some kind of jelly, supposed to be.

Q. Did you taste it? A. No, sir.

Q. Did you ever taste anything like it before.

Mr. SELVAGE.—He said he did not taste it.

Mr. DANFORD.—If your Honor please, counsel has turned this witness over for cross-examination and I object to counsel interfering with the cross-examination.

Q. Do you say now, Mr. Head, that you do not know what you found in these cans?

A. The contents are the same as when I found them.

Q. But they were a jelly substance?

A. Yes, sir.

Q. I ask you whether they were a syrup substance rather than a jelly substance?

A. I should say they were a jelly substance.

Q. Have you had any analysis made of the contents of these cans? A. I have not.

Q. Did you cause any analysis to be made by anybody else? A. I have not.

Q. Did anybody working under you, with your knowledge and consent do so?

A. Not to my knowledge.

Q. So far as you know there has been no part of any of this taken out for the purposes of analysis; is that correct?

A. I took a small part out on a knife-blade, that is all that has been taken out.

Q. On a knife-blade? A. Yes, sir.

(Testimony of Joseph Head.)

Q. Was it in the form of a syrup when you took it out?

A. It was in this form which I have stated already.

Q. Would it pour? A. No, sir. [39]

Q. It *runned not* pour? A. No, sir.

Q. Would it cake, if you cut it, or would it run back as if it were merely a syrup?

A. It was more of a jelly-like substance.

Q. Would it cake, if you cut it?

A. That is a question I cannot answer.

Q. You saw it? A. Yes, sir.

Q. You run a blade through it? A. Into it.

Q. And you lifted some out? A. Yes, sir.

Q. Don't you know from what you did see that it does not contain opium, or any derivative thereof?

A. Yes, sir.

Q. That it does not? A. Yes, sir.

Q. You affirm that it does not contain opium, and did not contain opium, when you opened it, and it does not contain opium now?

A. To the best of my knowledge.

Q. That it does not? A. Yes, sir.

Q. Now, having thus affirmed that you know that it did not contain opium, did you find anything in connection with it there that to your personal knowledge did contain opium?

A. You mean in connection with the cans or with the trunk, "Exhibit 5"?

A. I found stains on the trunk which, to the best of my knowledge are opium stains.

Q. Stains? A. Yes, sir.

(Testimony of Joseph Head.)

Q. But you found nothing in bulk, or in any commercial quantity? A. No, sir.

Q. Did you have an analysis made of the stains?

A. Yes, sir.

Q. Where is the analysis?

A. It is in the possession of the chemist.

Q. Where is the chemist?

A. He is outside in the corridor.

Q. What is his name? A. Mr. Dawson.

Q. Did he give you the result of his analysis, with reference to the several stains?

A. He has not given me any. [40]

Q. Do you say that to the best of your knowledge the stains are opium stains, without a chemical analysis?

A. Mr. Dawson did not report to me the result of his investigations.

Mr. DANFORD.—I object to that, your Honor, and ask that it be stricken out.

The COURT.—Answer the question.

A. Yes, sir.

Mr. DANFORD.—Q. Have you ever consumed or used opium for your personal use?

A. I have tested it by burning it with a match.

Q. But not by chemical process? A. No, sir.

Q. And you never took any of it into your system?

A. No, sir.

Q. You are stating that the stains which you found—some of them— were stains from opium; that is based upon your judgment without having any personal knowledge of what the chemical composition

(Testimony of Joseph Head.)

of opium is or of what opium is from personal use?

A. Yes, sir.

Q. You had in your possession at one time all of these trunks, had you? A. Yes, sir.

Q. Did you find in them these (referring to "United States Exhibit 7 for Identification")?

A. Yes, sir.

Q. You know what they are, do you?

A. They are what I have seen for over 17 years in the Customs-house.

Q. They are a paper substance; do you know where this paper came from, or was made? A. No, sir.

Q. Don't you know, as a matter of fact, that that paper was made in this country?

A. I do not know where it was made.

Q. From your 17 years' experience in seeing that kind of paper do you not know that it is paper made in this country?

A. I do not know where it is made. [41]

Q. You do not know that this paper was made in any other country? A. No, sir.

Q. What are these papers used for generally, from your 17 years of experience?

A. They are similar to the ones on the tins in that trunk.

Q. They are similar to some of the paper on the cans in "U. S. Exhibit 5 for Identification." Have you ever seen bundles of paper like that together, in your experience as a customs official? A. Yes, sir.

Q. And coming from foreign ports, of course?

A. Yes, sir.

(Testimony of Joseph Head.)

Q. Do you know what those that you saw and resembling this exhibit are used for?

A. It would only be a presumption on my part.

Mr. SELVAGE.—Mr. Head, if you know what they are used for, tell him what they are used for.

Mr. DANFORD.—Q. Answer it yes or no.

A. Yes, sir.

Q. They are used for labeling cans, or something else? A. Containing opium.

Q. When cans contain opium these are used for labelling purposes? A. Yes, sir.

Q. Did you ever see any of these cans that did contain opium when they came into your possession, in your official capacity?

A. Well, those are rather, I might say crude examples of genuine opium tins.

Q. In other words, they are not like the things that come in on genuine opium cans, and that you do know from examining them, although you do not understand the Chinese language? A. Yes, sir.

Redirect Examination.

Mr. SELVAGE.—Q. In your 17 years in the service of the Government, have you seen cans with material put up like this before? A. Yes, sir.

Q. What are they used for?

A. Containing opium.

Q. Have you seen cans with material in like this before? A. Yes, sir.

Q. What are they used for?

A. Containing opium. [42]

Q. Do these contain opium?

(Testimony of Joseph Head.)

A. Do you refer to the two you hold in your hands?

Q. Yes. A. No, sir, they do not.

Q. I asked you if you ever saw cans with material like this before? A. Yes, sir.

Q. What are the cans used for in this form?

Mr. PRICE.—We submit that the question has been asked and answered.

Mr. McKINLEY.—With this material in them?

Mr. DANFORD.—And he said it is not opium?

A. They are used for decoys or dummies.

Mr. SELVAGE.—Q. Do you know whether or not, in the sale of opium, they are slipped in sometimes?

A. We have found them in Chinatown amongst genuine opium tins.

Q. And this is an ordinary thing in your business—that is, in seeing these in your business?

A. Yes, sir.

Q. Now, as regards these labels, Mr. Head, what are they used for?

Mr. DANFORD.—That is objected to. It has been asked and answered so far as he knows.

Mr. SELVAGE.—But that was on cross-examination.

The COURT.—The objection is overruled.

A. Used on the outside of opium tins.

Mr. SELVAGE.—Q. Are they to dress up, after the label has been injured? A. Yes, sir.

Q. Have you had any experience with opium that has been brought in from Mexico across the border, as to what condition the cans are in after they get here? A. Yes, sir.

(Testimony of Joseph Head.)

Q. What condition?

A. Sometimes badly bruised, with the labels partly erased or torn off.

Q. And those labels are used for dressing them up afterwards, are they? A. Yes, sir. [43]

Recross-examination.

Mr. DANFORD.—Q. Mr. Head, you replied that you have seen cans like that used for decoy cans?

A. Yes, sir.

Q. And in the course of your experience, and presuming in your official capacity you have had some experience with reference to Government officials charged with having decoy cans in their possession, cans of axle-grease?

Mr. SELVAGE.—I object to that as not proper cross-examination. That has nothing to do with this case, as to what may have been found on some other person who is charged with crime.

The COURT.—You inquired about the decoy cans; I presume he might prosecute that inquiry.

Mr. SELVAGE.—Very well. I will withdraw the objection if that is the theory of it. A. Yes, sir.

Mr. DANFORD.—Q. Then that is not the only kind of cans containing substances that is not opium, and in your experience not the only kind of cans containing a substance which purported to be opium?

A. No, sir.

Q. Have you not seen 30 or 40 cans at one time purporting to contain opium but really containing axle-grease?

Mr. SELVAGE.—I will ask the witness to confine

(Testimony of Joseph Head.)

his answer to that question to his own knowledge.

Mr. PRICE.—We object to the District Attorney instructing the witness, and we assign it as error on the part of the District Attorney.

The COURT.—Do you mean for counsel to suggest that the witness answer only what he knows of his own knowledge,—do you mean that that is error?

Mr. PRICE.—He was instructing the witness not to answer the question in a direct form yes or no.
[44]

The COURT.—I did not so understand him. I thought he was suggesting that the witness be not permitted to answer except those things that he knew of his own knowledge. The question is, did you see 30 cans of axle-grease masquerading as opium?

A. I could not say the number; I have seen a number of them but I cannot say it was 30 or 40.

Mr. SELVAGE.—Q. I will ask you whether or not amongst other things in this trunk you found any samples of opium, or samples that were submitted to the chemist?

A. I found a small lump 'of opium in an envelope. That was not submitted to the chemist.

Q. How large? A. About the size of a walnut.

Q. Did you know the substance yourself?

A. To the best of my knowledge and belief it was opium.

Q. To whom did you turn that over?

A. To Mr. Tidwell; I think I have it here.

Q. You have it? A. Yes, sir.

Q. Do you remember which trunk this was found

(Testimony of Joseph Head.)

in? A. Trunk No. 5.

Mr. SELVAGE.—I offer this in evidence as an exhibit and ask to have it marked United States Exhibit No. 14 for Identification. (The article was here marked “U. S. Exhibit No. 14 for Identification.”)

Mr. CAMPBELL.—I would like to ask just one question: Q. Mr. Head, you are positive, as much as you can be, that this is the writing of Murphy on this hotel register, the name “Spencer”? A. Yes, sir.

Q. And you are certain of that?

A. To the best of my knowledge and belief.

Q. Just as certain of that as of any other portion of your testimony relative to his writing?

A. No, I could not answer that. [45]

Q. You are not as certain of this writing of his as you are as to the rest of his writing?

A. I thought you said in regard to my testimony in other matters?

Q. I mean with reference to this writing.

The COURT.—That is the only thing he has testified to about his writing, that he is familiar with it.

Mr. CAMPBELL.—Q. You are as certain of this handwriting as you are of any other writing of Murphy’s?

A. To the best of my knowledge and belief.

Q. What was the date that this sheet was taken from the register, if you remember?

A. Either on the 17th or 18th of September.

Mr. PRICE.—Just one more question, if your Honor please—

The COURT.—I must insist that one counsel cross-

(Testimony of Fred West.)

examine the witness; he cannot be passed from hand to hand.

Mr. DANFORD.—That is all, your Honor.

Testimony of Fred West, for the Government.

FRED WEST, called for the United States, sworn.

Mr. SELVAGE.—Q. What is your name?

A. Fred West.

Q. What is your business?

A. Chemist, in the Treasury Department.

Q. State whether or not you, in connection with any others, took samples of stains from clothing from these trunks that are here in evidence.

A. Yes, sir, I recognize the trunks and the contents.

Q. Did you make any analysis of the stains that you took, or the material?

A. Yes, sir, I made unofficial analysis. I am a chemist, serving under a chief chemist; I made my first analysis and reported to him and he made the official analysis and reported it.

Q. Where did you take the samples from?

A. I took samples from those trunks, in the office of Special Agent Tidwell.

Q. What part of the trunks did you take the samples from?

A. Some of the samples were taken by cutting out pieces of paper [46] with an adherent brown substance, others were taken by cutting out sections of those comforters and still others were taken from pieces of overalls.

Q. Who was the chemist to whom you submitted

(Testimony of Fred West.)

your report? A. Dr. Dawson.

Q. Did you make an analysis of all the different pieces or samples that you took?

A. The samples were taken from four trunks and put in four envelopes marked Exhibits "A," "B," "C," and "D," and each envelope was supposed to constitute a representative sample of the contents of that trunk and those were the materials upon which I worked.

Q. And you made the analysis of each?

A. I made some of each, yes, sir.

Q. And reported to Dawson?

A. I reported to Dr. Dawson.

Mr. SELVAGE.—You may cross-examine.

The COURT.—Q. What did you find the substance was? A. I found that the substance was opium.

Mr. SELVAGE.—I was going to get that from Dr. Dawson.

The COURT.—I think you had better get it from the man who made the examination, who made the analysis.

Mr. SELVAGE.—Q. You know what the samples were? A. Yes, sir.

Q. What were they? A. Opium.

Q. What kind of opium?

A. They were smoking opium; that is, what we call smoking opium is the soft extract of opium sold under the name of smoking opium.

Mr. SELVAGE.—You may cross-examine.

Cross-examination.

Mr. DANFORD.—Q. You have handled a great

(Testimony of Fred West.)

deal of smoking opium, have you?

A. The examination of smoking opium is an analysis which— [47]

Mr. DANFORD.—Just a moment. If your Honor please, that is not responsive.

The COURT.—Can you answer the question?

Mr. DANFORD.—The Reporter will read the question to you.

(Question repeated by the Reporter.)

A. No, not a great deal.

Q. How often have you had occasion to analyze, if you did analyze opium?

A. Well, six times within a year.

Q. And was it always in bulk or stains such as these? A. No.

Q. Was it always in bulk alone, excepting this time? A. It was in cans.

Q. Then when you examined or analyzed opium in a can you took it from what was in the form of commercial quantities?

A. I would not understand your meaning of commercial quantity; we have a unit for opium.

Q. For instance, what you get from a mere stain would not be as pronounced as what you would get from a can containing a commercial quantity, would it? A. Yes, yes, of course.

Q. It would be as pronounced? A. Yes, sir.

Q. Then, if I let you extract from under my nail, and it were reasonably long, a portion of opium, and you analyzed it, you would get the same results, would you, as you would get from what you would take out

(Testimony of Fred West.)

of a can with a spoon?

A. Well, it would be a case of how much your finger-nail would hold.

Q. If it would hold, for instance, a dram?

A. A dram of opium would be sufficient for about ten analyses, and if you made one analysis ten times from that quantity of opium you would feel you were justified in saying it was opium, in my opinion.

Q. What else did you find in your analysis of the stains besides [48] opium?

A. The question is a little too fine in calling for stains. They were not stains; they were adherent masses.

Q. I believe you said in your direct testimony they were adherent masses; you also found names which you analyzed, did you not?

A. The materials I analyzed were not stains, they were adherent masses. I would not consider a stain of opium sufficient to work upon; I would want a larger sample.

Q. Now, from your knowledge of opium in cans which you did examine in other instances, would you say that there could be a leakage from a can which would form a crust or adherent substance that could be the subject of analysis?

A. Why, certainly, enough to leak out of a can could be analyzed.

Q. What happens to opium when it leaks out of a can and strikes the open air?

A. Are you asking the question as of opium or what is known as smoking opium?

(Testimony of Fred West.)

Q. You testified concerning smoking opium, did you not? A. I did.

Q. What happens to a substance called smoking opium when it leaks out of a can and when it strikes the air?

A. When it strikes the air there would be a natural evaporation of the water contents, the extract would become slightly harder and if allowed to stay for several days would become brittle through the absence of the water.

Q. Would it not lose some of its constituent elements? A. No.

Q. It would not lose any? A. No.

Q. What are the constituent elements of smoking opium?

A. The constituent elements of smoking opium would be first, what would be regarded as its active principle, that is, what would give it its power to produce narcosis upon something; that is the alkaloid present. [49]

Q. What would be the other?

A. The other would be the water present, and finally what is termed in chemistry or pharmacy as the vegetable extractive.

Q. That is two, and the water is three; each one of those has a chemical effect when joined together to constitute smoking opium; each one of those constituent elements has a certain chemical effect and when joined together they constitute smoking opium; is that correct?

A. No, not in my opinion.

(Testimony of Fred West.)

Q. Does smoking opium consist of the three elements which you have enumerated? A. Yes, sir.

Q. Then is it not necessary that there be a chemical action to join those three elements, in order to constitute smoking opium? A. Positively no.

Q. Then you could have smoking opium without any one of those three elements?

A. I did not say that.

Q. Well, what do you say?

A. I say I do not agree with you when you state it is necessary to have the alkaloids and water and vegetable extracted, and I think I can substantiate what I mean.

Q. We will perhaps give you a chance. Opium you say consists of three specific elements, which you have enumerated? A. Smoking opium.

Q. Are those three elements indispensable to that bulk which constitute smoking opium?

A. To the bulk?

Q. Yes.

A. They are indispensable to the bulk, yes, sir.

Q. And with any one of those three elements extracted, the narcotic element, for instance, or the element that produces narcosis, it would not be opium, would it? A. Yes, yes, it would.

Q. Could you extract any one of those three elements and still have it opium. A. Yes, sir. [50]

Q. And still have opium?

A. And still have smoking opium?

Q. And still have smoking opium? Can the prop-

(Testimony of Fred West.)

erty be put together called smoking opium without water?

A. Well, that would involve a commercial definition.

Q. Give it.

A. A smoking opium is an aqueous extract of opium of a certain consistency. When it is smoked it is taken up on the end of a wire and is placed over a flame and cooked; in the cooking process it bubbles and swells and gives off gases and water; after the water is off it is in a condition to be consumed by fire, in the process of combustion.

Q. Could combustion begin if the water were not there?

A. Why it would be more rapid if the water were not there.

Q. Would it have the same narcotic effect?

A. Yes, sir.

Q. What purpose does the water serve?

A. It serves the purpose of a vehicle in adjusting the consistency so it can be handled on the end of a wire.

Q. Without the water being there, it could not be conveyed, could it? A. Yes, sir.

Q. How?

A. You could take a pinch of it up and roll it between your fingers and put it there.

Q. But it could not be used for smoking purposes unless there was the means of conveyance there, could it?

A. Yes, you could take and chip it off with a ham-

(Testimony of Fred West.)

mer, or anything you wanted.

Q. You found other stains there; did you analyze them?

A. I have reported that the contents of those four envelopes constituted the samples.

Q. What other chemical substances did you find in the analyses?

A. I did not look for any other.

Q. You did not look for any other? A. No.

Q. Don't you know as a chemist, that the substances that you did analyze could be combined with other chemical substances which would [51] make them usable solely for medicinal purposes and not for smoking at all? A. I do not.

Q. What experience have you had as a chemist?

A. Before I was in my present position I was chemist in the Board of Health, San Francisco.

Q. What education had you in your preparation for chemistry?

A. I studied in the College of Pharmacy, San Francisco. My Professor in chemistry was Professor Frank T. Green, Special Toxicologist, and he specialized with the students.

Q. What College of Pharmacy was it?

A. The San Francisco College of Pharmacy; there is only one.

Q. And you graduated? A. Yes, sir.

Q. And you don't know that the other stains which you analyzed could when combined with what you *said contained* form a product other than opium used for smoking purposes?

(Testimony of Fred West.)

Mr. SELVAGE.—I submit that he answered the question, and he answered directly.

Mr. DANFORD.—It is put in a different form now.

Mr. SELVAGE.—Well, let the witness understand then whether it is a repetition of the other question or whether you are summing up what he formerly testified to. That is the only matter I wish to call attention to.

Mr. DANFORD.—We are willing to stand on his previous answer, if your Honor please. That is all.

Redirect Examination.

Mr. SELVAGE.—Q. You say you do not know of anything that could be introduced into the substance that you analyzed that could make it in any form for medicinal purposes?

A. Well, from my knowledge as a chemist and as a pharmacist I turned over in my mind the things that would be liable to be put there for medicinal purposes and I cannot think of anything that could be. Opium has a well defined action and it is usually used by itself for its narcotic effect; it stands up alone as that kind of a [52] drug; what they could or would combine with it I cannot think.

Mr. DANFORD.—Q. You are familiar with what is known as gum opium, *have* you not?

A. Yes, sir, I have handled it, and I have seen it.

Q. Don't you know from what you have handled of it and from what you have seen, and as an expert, that it can be purchased in commercial quantities?

(Testimony of Fred West.)

A. It can, subject to certain restrictions of the law.

Q. What are the restrictions?

A. The restrictions of the law are that those things sold must be registered.

Q. Conceded; you do not mean there is any restriction with reference to the revenue laws of the United States, do you?

A. I was not referring to the United States laws; I was referring to—

Q. (Intg.) You mean like any other medicine sold in a pharmacy?

A. Oh, no; that was not the question as I understood it. Like any other medicine sold in a pharmacy would not be like the commercial sale of gum opium, because you could not buy it.

Q. In short, you do not refer to any revenue laws of the United States?

A. No, I am referring to the custom of wholesale druggists and retail pharmacists with regard to registering poisons.

Q. But it could be purchased in commercial quantities all over the Country, could it not?

A. I think not. I think it could not be purchased in a commercial quantity if a commercial quantity would be what I would judge to be a shipment of it, received from a large firm.

Q. Can you not go in the City of San Francisco now and buy a lb. of it?

A. By virtue of the fact that I am a registered pharmacist in the State of California, I can.

(Testimony of Fred West.)

Q. And could not somebody else go down, with proper credentials, and buy a lb. of it?

A. No; if by proper credentials you refer to something else besides the fact that he is a registered pharmacist or a practicing physician, no. I judge that you are not a registered [53] pharmacist or a practicing physician, and if you went to any of the wholesale drug houses for a lb. of opium I think you could not buy it.

Q. You refer to gum opium?

A. Opium and gum-opium are synonymous.

Q. You could go down and buy 10 lbs. of it, could you not?

A. If I were engaged in the drug business and went down and asked for 10 lbs. of opium there would be an inquiry as to what I wanted to do with that quantity.

Q. Could you not go down to a drug-store in this city now and buy 10 lbs. of it, if they had it?

The COURT.—There is no occasion for any extreme heat, is there?

Mr. DANFORD.—This witness is parrying; it is very evident to me that he is.

The COURT.—Not at all; he is answering your questions straightforwardly.

A. I doubt if I could.

Q. Could you go down and buy a quantity of it?

A. I doubt if I could because I am not engaged in the retail drug business and I would have to show I had a legitimate reason for wanting it.

Q. What do you maintain would be necessary for

(Testimony of Fred West.)

me to do to go down and buy any quantity of it?

The COURT.—Oh, go hunt up the law and find out. Let us pass this.

Mr. DANFORD.—Q. After gum-opium has been cooked do you know what form it would take? Would it not take the form of smoking opium.

A. I don't understand what you mean by cooked unless you mean cooking in the process of smoking.

Q. After gum opium is cooked on the end of a pipe, or in any other [54] manner, would it not be a smoking opium?

A. I don't understand what you mean by the word cooked. There is culinary cooking and there is cooking on the end of a wire, what they call Yen Hock. I could take a little pill of gum-opium, it is very pliable, it is a little thicker and heavier than dough, and put it on the end of a wire and cook it and get the physiological effect of smoking opium; I would not have smoking opium because I have already given you the definition of smoking opium as an aqueous extract of opium having certain consistency.

Q. Will you tell us as a chemist how Yen Shee is prepared for smoking?

A. That would be a difficult question. I know what Yen Shee is.

Q. If gum-opium is cooked in any manner that you do know of, would it constitute Yen Shee or smoking opium?

A. Yes or no will not answer the question for me.

Q. Well, do you whether *whether* it would or

(Testimony of Fred West.)

whether it would not?

A. I would like to tell the Judge and this gentleman who is cross-examining me—

Mr. DANFORD.—Your Honor, I do not appear to wish to be tedious or technical, but—

The COURT.—No, but you want the answer you want, and when you don't get the answer you want you get a little impatient about it.

The WITNESS.—I want to tell you something right now; there is a difference of opinion as to what Yen Shee is.

The COURT.—Yen Shee has been defined by the courts to be the residuum after opium has been smoked.

The WITNESS.—Yes, that is what Yen Shee is. Your question shows that you do not realize that. You are giving the term smoking-opium the name Yen Shee, which is not proper.

Mr. DANFORD.—Q. Now answer the question if gum-opium when cooked in any form you know of in which it can be cooked, would it [55] constitute Yen Shee or smoking-opium?

A. I would like to have the question repeated.

Q. I will repeat the question now and repeat it: If some opium is cooked in any manner known to you in which it could be cooked, will it not constitute smoking-opium.

A. No, it will not.

Q. What will it constitute?

A. It will constitute the residue from smoking-opium, which is commonly known as Yen Shee.

(Testimony of Fred West.)

Q. Gum-opium is not smoking-opium, is it?

A. No, but if you smoke it it is a smoking-opium; I have already tried to answer your first question so as to make it known that I have given you the definition of smoking-opium; and then when you use the words Yen Shee synonymously with it I want to correct your error.

Q. But you do admit that gum-opium when smoked constitutes smoking-opium?

A. No, I say gum-opium can be smoked.

Q. Gum-opium can be smoked? A. Certainly.

(A recess was here taken until 2 P. M.)

AFTERNOON SESSION.

Testimony of John H. Dawson, for the Government.

JOHN H. DAWSON, called for the United States, sworn.

Mr. SELVAGE.—Q. Your name is John H. Dawson? A. Yes, sir.

Q. Where do you reside?

A. 2489 Howard Street, in this city.

Q. What official position do you occupy with the United States Government, if any?

A. Special Examiner of Drugs, Chemicals and so forth, in the Customs-house.

Q. State whether or not there was submitted to you any specimens [56] that were taken from these trunks that we have here. A. Yes, sir.

Q. Did you make a chemical analysis of them?

A. Yes, sir.

Q. State what the result was.

A. Smoking opium.

(Testimony of John H. Dawson.)

Cross-examination.

Mr. DANFORD.—Q. Who gave you the specimens? A. Mr. West.

Q. Is he the chemist who testified this morning?

A. Yes, sir.

Q. Doctor, did you make the analysis from the beginning to the end of the operations yourself?

A. Yes, sir.

Q. You have handled a great deal of smoking opium in your time as a chemist, have you not?

A. Yes, sir.

Q. What does smoking opium consist of?

A. An aqueous extract of opium.

Q. What are its constituent parts, doctor?

A. It contains a great many alkaloids. Those are the principal constituents. They are the principal component parts of opium.

Q. What are the principal parts?

A. There are a great many different elements in it; some are morphine, barium, narcotinic acid; about 18 altogether.

Q. If several of the principal parts of it were extracted, it would not be opium, would it?

A. It would be nearer to opium than it would be to anything else, no matter what you took from it.

Q. Because of what?

A. It would compare with nothing else. If you took one alkaloid away it would still be opium minus that alkaloid.

Q. If you took most of them away?

A. Then you would not have much left.

(Testimony of John H. Dawson.)

Q. If you took most of the constituent parts away, without taking that away which produces narcosis, it would still be opium, would it?

A. It would not be the complete product called smoking opium. [57]

Q. Have you ever had occasion to examine powdered opium?

A. We never get powdered opium to examine in the Custom-houses. But as a pharmacist I have examined powdered opium just simply to know that it was powdered opium.

Q. And as a chemist if you examined powdered opium you would know what its constituent parts were? A. Yes, sir.

Q. Can you take powdered opium and by a mixture of water make smoking opium out of it?

A. It would be very close to it; it would not be smoking opium.

Q. If you took powdered opium and mixed it with water would it not make something very much identical with the specimens that were handed to you?

A. No, sir. Powdered opium is the gum-opium powdered. It contains a number of other things, sometimes vegetable matter, that smoking opium does not contain. Smoking opium as being the aqueous extract of gum-opium filtered before its evaporation produces smoking opium. It has a little ash in comparison with gum opium, which has considerable ash.

Q. You could take gum-opium and from it make smoking opium could you not?

(Testimony of John H. Dawson.)

A. They make smoking opium from gum-opium, yes.

Mr. SELVAGE.—Q. Did this specimen or these specimens that you analyzed possess all the properties of smoking opium?

A. All the characteristics and properties of smoking opium, yes, sir.

Mr. DANFORD.—Q. Did you find any evidence of any other chemicals? A. No, sir.

Q. Did you know of any stains in these exhibits?

A. I only know of what was handed to me; they were not stains.

Q. Those were the specimens only?

A. The specimens that I examined were sufficiently large and in sufficient amount to make the proper examination to identify smoking opium, and I identified them as smoking opium, every one. [58]

Q. But you don't know anything about the stains referred to in the exhibits except in so far as the specimens handed to you are concerned?

A. I heard nothing about any stains, only what I heard you say.

Testimony of Raphael Manzo, for the Government.

RAPHAEL MANZO, *call* for the United States, sworn.

(HERMAN A. KELLUM, sworn to act as Interpreter.)

Mr. SELVAGE.—Q. What is your name?

A. Raphael Manzo.

Q. Where do you reside?

A. Nogales, Arizona.

(Testimony of Raphael Manzo.)

Q. What is your business or occupation?

A. Manager of the Nogales, Sonora Bank.

Q. How long have you been acting as manager of that bank? A. About two years.

Q. Do you know the defendant here, George Poole?

A. Not that gentleman. I know Mr. Moore.

Q. Do you know either of the defendants sitting here at the table?

A. The one on the other side, at the further end.

Mr. SELVAGE.—I will ask that the defendant stand up.

A. (Continuing.) It is the last gentleman.

Q. By what name do you know this man?

A. Moore.

Q. Do you know his first name?

A. George,—George, I guess.

Q. How did you become acquainted with him?

A. Because I had to give him four cases.

Q. Whereabouts were the four cases given to him?

A. In Nogales, at Sonora.

Q. What did those cases contain?

Mr. PRICE.—We object to this, your Honor, as immaterial, irrelevant and incompetent; any cases of any kind given to him in Nogales, Sonora, presuming that Sonora means the Republic of Old Mexico, [59] there is nothing laid in the indictment about any other place but El Paso, Colorado, and California; therefore this is incompetent, and immaterial and irrelevant.

The COURT.—The objection is overruled.

(Testimony of Raphael Manzo.)

Mr. DANFORD.—We note an exception.

A. He said they were clothes; I did not know.

Mr. SELVAGE.—Q. How did you come to have the business of delivering these goods to him?

A. In accordance with an order from an officer of the bank in the City of Juarez.

Mr. PRICE.—I object to it, your Honor, and on the same grounds ask to have it stricken out, for the very reason that what is now testified to took place in a foreign country. This indictment specifies and limits them to what took place in this country.

The COURT.—Oh, no, it does not. I don't know what the purpose of this testimony is, but I assume that it is to trace these things from the places from which it is averred in the indictment they were brought to San Francisco. You don't have to aver that they started in Paris or Trinidad, or anywhere else; that is a matter of defense.

Mr. PRICE.—We ought to know that so that we will know what we are obliged to defend.

The COURT.—You are obliged to defend from El Paso, Texas, or Trinidad, Colorado, or some other point of that sort.

Mr. PRICE.—And we are not obliged to defend as to what took place in Mexico?

The COURT.—No.

Mr. SELVAGE.—Q. Did you know what those cases contained? A. I never opened them.

Q. But without opening them, did you know what they contained?

Mr. DANFORD.—We object to that; he said he did not know. [60]

(Testimony of Raphael Manzo.)

The COURT.—No, he did not say that; he said he did not open them.

A. Without looking at them I could not tell, without looking at the interior.

Q. Answer the question, did you know?

A. They told me that it contained opium, but I did not see anything.

Q. Who told you? A. The Chinaman told me.

Mr. PRICE.—We move that that be stricken out as hearsay.

The COURT.—Let it go out.

Mr. SELVAGE.—Q. Did you have any conversation with Mr. George Moore at the time that he got these cases, as to what they contained?

A. No, no conversation with Moore at all regarding that subject.

Q. Did he have any order that he presented to you to get these cases?

Mr. PRICE.—If your Honor please, we submit that that has been asked and answered not once but twice; it only serves to take up time.

The COURT.—I think that is the first time that that question has been asked.

A. He had an order from the agency in the City of Juarez.

Mr. SELVAGE.—Q. State whether or not that order was from the same place from which you received the goods.

A. No, that did not come from the same place.

Q. Did the order describe what the contents of the goods were? A. No, only four cases.

(Testimony of Raphael Manzo.)

Q. Did you and Mr. Moore have any conversation about those cases?

A. No conversation, nor did I give them to him; a laborer gave them to him. I was in Arizona and I could not go into Sonora on account of the revolution.

Q. Where were these goods stored? [61]

A. They were in the bank, in a closed room?

Q. Do you know what the value of these cases were?

Mr. DANFORD.—I object to that as immaterial, irrelevant and incompetent. There is no identity of the cases connected with these defendants, or either of them.

The COURT.—The objection is overruled.

Mr. DANFORD.—We note an exception.

A. I thought they were worth about \$1,000, in American money.

Mr. SELVAGE.—Q. Each case?

A. Each case.

Q. How large were these cases?

A. A small square, a very small square.

Q. 2 feet square? A. Less.

Q. Less than 2 feet square? A. Yes, sir.

Q. By whom do you say they were consigned to your bank?

A. They came from the port of Manzanillo, Mexico, from the Agency in that city, from the Agency—from the bank in the City of Juarez.

Q. I understand that it is not unlawful to deal in opium in Mexico?

(Testimony of Raphael Manzo.)

A. No, it is not contraband there.

Mr. PRICE.—Just a moment. We object to that. The laws of Mexico would be the best evidence as to that.

The COURT.—An expert may testify to what the law is, if he knows.

Mr. DANFORD.—He has not shown himself to be an expert.

The COURT.—You can examine him and find out if he knows. I think we would get along faster if you gentlemen would dwell on the material things in this case and not trifles like that. Do you claim that opium is contraband in Mexico?

Mr. PRICE.—No, we do not make that claim.

Mr. DANFORD.—We agree with counsel but we contend that it has no place here. [62]

The COURT.—You can make your objection.

Mr. DANFORD.—We object to it as immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled. The answer was given before the objection was made. You cannot sit here and listen to an answer and if it is not favorable to you then move to strike it out.

Mr. SELVAGE.—You may cross-examine.

Mr. DANFORD.—No questions.

Mr. PRICE.—Q. Just one question. What finally became of these cases you testified to as having been turned over to you? A. I don't know.

**Testimony of Guillermo McAlpine, for the
Government**

GUILLERMO McALPINE, called for the United States, sworn.

(Testimony given through the same Interpreter as the preceding witness.)

Mr. SELVAGE.—Q. Where do you reside?

A. I reside in Nogales, Sonora, Mexico.

Q. What is your occupation?

A. I am employed in the bank at Nogales, Sonora, Mexico.

Q. Do you know either of these defendants sitting here? Let them stand up.

A. I know the gentleman over there.

Q. What is his name?

A. I don't know his name.

Q. When did you first see him or become acquainted with him?

A. I remember him about four months ago going once to the bank.

Q. Do you know what his business was at the bank?

A. He went to the bank to secure some cases that were in Nogales, Sonora.

Q. Do you know what was in those cases?

A. We did not know what was in them because they were closed. [63]

Q. Did you know what character of goods you were receiving when you received them?

A. Nothing; they were closed cases that were destined for that place there at the order of the bank of the City of Juarez.

(Testimony of Guillermo McAlpine.)

Q. To whom were they to be delivered?

A. Whosoever would come there with an order from the bank of the City of Juarez.

Q. Who came with an order from the bank at the City of Juarez?

A. The gentleman there brought it once; the gentleman on that side brought it once (pointing).

Q. How far is Juarez from El Paso?

A. I don't know.

Q. About how far is Juarez from El Paso?

A. I don't know anything about the distance; I delivered the goods at Nogales, Mexico.

Q. Have you traveled over the road from Juarez to El Paso, Texas? A. No, never.

Q. How did this man receive the goods?

A. Closed.

Q. How did he take them over?

A. The Morso—the servant—employed there, went with the gentleman with the goods to deliver them there in Mexico.

Q. How did he take them away?

A. The boy gave them to this man closed.

Q. Will you kindly describe the cases or boxes?

A. It was about this size, bound with a packing-sack, and tied with rope.

Q. How large were they?

A. About this size (indicating).

Q. About 2 feet square?

A. They were longer than wide; they were not exactly square. A little more or less, probably a little less.

(Testimony of Guillermo McAlpine.)

Q. Do you know how many tins each one of these contained?

Mr. PRICE.—One moment. There is no evidence that these things contained tins.

The COURT.—No, there is not; if he does not know he will [64] probably say so.

A. I don't know, but judging from the people who went there, they might have contained about 100 or so.

Q. How many times did Mr.—did you know the man by the name of Poole, or Moore?

The COURT.—He said he did not know his name.

Mr. SELVAGE.—Oh, yes, that is right.

Q. How many times did he get goods of that character there?

A. All I remember is but one time.

Q. About what date *what* that? I will withdraw that question. Have you the receipt with you that he gave for that package or for the packages?

A. He gave the boy the receipt.

Q. Have you the receipt with you?

A. I have the receipt.

Q. I would like to see it, please.

A. This is it.

Q. Is the date of this receipt the date he got the goods from your bank?

A. I believe it is the same date.

Q. June 10th, 1913? A. That is the date.

Mr. SELVAGE.—I offer this in evidence as the receipt for the goods that were received by George Moore, the defendant here, with the boxes.

(Testimony of Guillermo McAlpine.)

(The document was here marked "United States Exhibit No. 15.")

Q. How many of these boxes were there?

A. Four delivered by us.

Q. Do you know the value of those boxes?

A. They varied in value; sometimes they had one value and sometimes another.

Q. About the value?

A. About \$1,000 or \$1,100.

Q. Did you not know when you were delivering the goods what it was? I don't ask you now if you saw them, but I ask you if you did not know from handling the goods what it was?

A. Only the cases. I knew they were cases that were at the disposition of the bank. [65]

Q. You handled other cases of that same character, did you not?

A. They received those on deposit and delivered them as they ordered them.

Q. Didn't you know what they contained?

Mr. PRICE.—We object to that, your Honor; the question has been asked and answered.

The COURT.—No, it has not been answered at all yet.

A. I did not know with certainty what they were, but in the orders which were given to me they were labeled "Amapol."

Q. What does that mean? A. I don't know.

Q. How is that spelled? A. "A-m-a-p-o-l."

Q. Did you not, and did not the officers of the bank

(Testimony of Guillermo McAlpine.)

know, so far as you know, that that was opium they were handling?

Mr. PRICE.—We object to that.

Mr. SELVAGE.—I will strike out the part relating to the officers and leave it just as to himself.

A. In the orders there was nothing but that one word.

The COURT.—Q. That does not answer the question: did you know yourself?

A. It did not concern me what was in them.

Q. Now, answer the question?

A. I did not know.

Q. Was that goods not referred to frequently by those who were handling it as opium?

Mr. CAMPBELL.—Your Honor, we desire to interpose an objection to this question as immaterial, irrelevant and incompetent and it would be absolutely hearsay and could not bind the defendants.

Mr. DANFORD.—And unwarrantedly leading.

The COURT.—Yes, I know that it is leading.

Mr. SELVAGE.—I have to ask leading questions to this witness.

Mr. DANFORD.—This witness has been frank about everything. [66]

The COURT.—He appears to be fairly frank; he says he does not know what these boxes contained.

Mr. SELVAGE.—I am asking him if they all did not refer to that as opium.

The COURT.—That would not bind this defendant unless the defendant also referred to them.

Mr. SELVAGE.—Q. Did you have any conversa-

(Testimony of Guillermo McAlpine.)

tion with this defendant when he got the goods?

A. No.

Q. Did he talk any to you, or to anybody in your hearing? A. No.

Q. How did you know that those cases were worth \$1,000 or \$1,100 each?

Mr. DANFORD.—I object to that, your Honor, as cross-examining his own witness.

The COURT.—Oh, yes, he can do that, if permitted. The objection is overruled.

A. The value was given to them by the Agency; they gave it.

Mr. SELVAGE.—Q. Did this Agency state to you why this box was so valuable, or these boxes were so valuable?

Mr. DANFORD.—That is objected to as immaterial, irrelevant and incompetent, and not stated in the presence of any of these defendants.

The COURT.—The objection is sustained.

Mr. SELVAGE.—Q. Do you know the reason why—

The COURT.—Q. Where did the box come from?

A. Manzanillo.

Q. Is Manzanillo a seaport? A. Yes, sir.

Q. And they came to you at Nogales en route to Juarez.

A. No, sir, they came to Nogales direct.

Q. On the way to Juarez?

A. No, sir, on the way to Guaymas.

Q. I thought they were at the disposition of the Bank of Juarez?

(Testimony of Guillermo McAlpine.)

A. They were at the disposition of the bank but they came that way. [67]

Q. I understand that, but they came to your bank at Nogales from Manzanillo, a seaport?

A. Yes, sir.

Q. To the order of the bank of Juarez?

A. Yes, sir.

Mr. SELVAGE.—Q. Do you know where these cases went to after they left your bank?

A. No, I do not know.

Q. Do you know how this defendant received them and how he took them away?

A. They were closed, and as they received them from the boy I know nothing about their disposition.

Q. In what place were they kept in the bank?

A. In a room in the bank.

Q. Was there any other commodity kept there with these boxes? A. The books of the bank.

Q. How is it that you came to store these boxes along with the books of the bank in a private room?

A. The boxes were very large, and we were unable to put them in the vaults of the bank.

Q. Was it on account of their value that they were kept there?

A. Also so that they would be safe there.

Q. Did you ever see boxes of that character opened there? A. There they never open boxes.

Q. Did you ever see them opened anywhere, any other place? A. At no other place.

Q. Did you ever see any of the tins that were in those boxes, outside of the boxes?

(Testimony of Guillermo McAlpine.)

Mr. PRICE.—Your Honor please, we object to that as assuming a fact not in evidence. It is not in evidence that these boxes contained tins.

The COURT.—The objection is sustained.

Mr. SELVAGE.—Q. Did you ever see any opium tins on the outside of these boxes, or in boxes of that character I should say? [68]

A. Yes, sir, I have seen them; I know them.

Q. Were there ever any packages of opium sent through the bank that were not encased in large boxes? A. Never sent outside of the boxes.

Q. Was opium, if any went through the bank, always contained in cases of that form.

Mr. PRICE.—The question is objectionable because it assumes that they are always in that form.

The COURT.—Strike out the word “always.”

A. I do not know anything about the character of the opium only that it was sent in cases marked, as I said before, “Amapol.”

Mr. SELVAGE.—Q. Do you know of any produce in Mexico by the name of Amapol?

A. There is only a flower that is called “Amapola.”

Q. Do you know whether or not opium in Mexico is called “Amapol”?

A. In Mexico opium is called opium.

Q. What is the flower that you just mentioned?

A. It is a flower about this size, with a little point in the center that is yellow, in the center; it is a red flower with a little yellow point in the center.

Q. It is a poppy?

(Testimony of Guillermo McAlpine.)

A. I don't know what poppy is except they use that California word; it is a scientific word in Spanish.

Mr. DANFORD.—I submit, if your Honor please, that this whole line of examination is immaterial, irrelevant and incompetent. I do not wish the Court to think, however, we are trying to shut anything out.

Mr. SELVAGE.—I think you may cross-examine.

Mr. DANFORD.—No cross-examination.

Testimony of J. E. Benton, for the Government.

J. E. BENTON, called for the United States, sworn. [69]

Mr. SELVAGE.—Q. Mr. Benton, where do you reside? A. El Paso, Texas.

Q. What is your business or occupation?

A. I am Paying Teller in the First National Bank.

Q. State whether or not you know either of these defendants here, Mr. Poole or Mr. Andrews.

A. I know Mr. Poole.

Q. You do not know the other gentleman?

A. No, sir; I don't think I do.

Q. Where did you know Mr. Poole first?

A. In El Paso.

Q. In what way did you become acquainted with him? A. Through transactions at the bank.

Q. Did you see him at the bank? A. Yes, sir.

Q. Go on and state the particular relations you had with him there at the bank.

A. On several occasions he had money telegraphed to him from California to the bank, a bank in Cali-

(Testimony of J. E. Benton.)

ifornia telegraphed us to pay him money, and I paid it to him.

Q. And you paid him the money? A. Yes, sir.

Q. Have you the orders, or have you the telegrams upon which you paid money, and the receipts you received from them?

A. I have carbon receipts; the original was returned to the bank ordering the money paid.

Q. You have the carbon receipts? A. Yes, sir.

Q. Have you any telegrams that were received by the bank? A. Yes, sir.

Q. I hand you a telegram here and ask you what that is?

A. It is a telegram from the San Joaquin Valley Bank of Stockton, California, in code, to pay George P. Olin, care Erwin & Co. \$300.

Q. From what bank?

A. The San Joaquin Valley Bank of Stockton, California.

Q. Who presented himself for that money? [70]

A. Well, I could not say. There was no one asked for the money in that name.

Q. Well, what happened in relation to that telegram, did you pay it on that telegram?

A. No, sir.

Q. Why not.

A. I had the telegram several days and a party came into the bank inquiring for money, saying they were expecting money from Stockton, California—

Q. Which party?

A. Mr. Poole; and I told him we had a telegram

(Testimony of J. E. Benton.)

from Stockton, California, but it was not to him; and I believe he went out and afterwards returned again and inquired with regard to this telegram, and I showed him the telegram and showed him that it was for George P. Olin. He said it evidently was for him but the name must have gotten balled up, I believe was his expression, in transit.

Q. Did you refuse to pay that on the ground that you did know him as Moore?

A. No, as George Poole.

Q. Did you receive any other telegram from the same bank? A. Yes, sir.

Q. What is that (handing)?

A. That is a telegram from the San Joaquin Valley Bank of Stockton, California, to pay George O. Poole some money.

Q. And how much is that?

A. Altogether, \$400.

Q. Did you pay that to him? A. Yes, sir.

Q. What was the date of it?

A. It is dated March 20th.

Q. Are both of them March 20th? A. No, sir.

Q. What is the other one? A. March 14.

Q. State whether or not you took any receipts for that money or any other money that you paid him.

A. Yes, sir, I did.

Q. Just show us in this book if you have the receipts. A. I have three receipts. [71]

Q. By whom are they signed?

A. They are carbon copies.

Q. By whom are they signed?

(Testimony of J. E. Benton.)

A. By George O. Poole.

Q. In his handwriting? A. Yes, sir.

Q. I suppose you want this book to take back with you intact, do you? A. It is a record of the bank.

Q. I would like to introduce them in evidence, with the privilege to the witness of withdrawing them, or I can pass them to the jury and let the jury see the signature.

Mr. PRICE.—We have no objection.

Mr. SELVAGE.—I will pass this around and show his signature. What is the aggregate of those?

A. I could not say off-hand, I think about \$600.00.

Mr. SELVAGE.—I will ask to read these telegrams into the record so that they will not need to be introduced.

Mr. PRICE.—We have no objection.

Mr. SELVAGE.—I will read this telegram into the record so that we will not have to introduce it.

“Received at 2-52, G S R 13, Stockton, Cal. March 14 First National Bank, El Paso. Abaco hummer Geo P. Olin, care Erwin Co. Talor Vermicule toniard. We remit. The San Joaquin Valley Bank. 5-08. P. M.”

Q. There is noted on here, which I suppose is an interpretation or translation of it, is it?

A. Yes, sir; that is what it is.

Q. “Pay to George P. Olin care Erwin Co. We remit, \$300.” The other is dated “Stockton, Cal. March 20, 1913. First National Bank, El Paso, Texas. Pay George O. Poole, care E. Erwin Co. \$100; also pay him the \$300, our cipher wire March

(Testimony of J. E. Benton.)

14 to George P. Olin, name incorrect, should be George O. Poole. We remit \$100 today. San Joaquin Valley Bank, 3-55 A. M." [72]

Mr. DANFORD.—If your Honor please, we move to strike out any reference there made to anything previous to the 1st day of May, 1913, the date alleged in the indictment.

The COURT.—The motion is denied.

Mr. DANFORD.—We note an exception.

Mr. SELVAGE.—“El Paso, Texas 3-21: 1913. Received of First National Bank of El Paso \$100 one hundred. Account telegraphing transfer from San Joaquin Valley Bank, California. Identified by none. George O. Poole.”

“El Paso, Texas, 3-21, 1913. Received of First National Bank of El Paso, three hundred dollars, \$300, account telegraphing transfer from San Joaquin Valley Bank, California.” Identified by none. George Poole.”

“El Paso, Texas, 3-25, 1913. Received of First National Bank of El Paso, two hundred \$200, account telegraphing transfer from San Joaquin Valley Bank. Identified by none. George O. Poole.”

Mr. DANFORD.—If 3-25-13 means March 25, 1913, we object to that upon the ground that it is several months prior to the date alleged in the indictment, namely, May 1st, 1913, and for that reason it is immaterial, irrelevant and incompetent.

The COURT.—The motion is denied.

Mr. DANFORD.—We note an exception.

Mr. SELVAGE.—You may cross-examine.

(Testimony of J. E. Benton.)

Cross-examination.

Mr. PRICE.—Q. This telegram of March 20th corrects the telegram of March 14th, does it not?

A. Yes, sir.

Q. The telegram of March 14th directing the payment of George P. Olin was an error?

A. That is the way I understood it, yes, sir.

Q. It should have been sent, "Pay to the order of George O. Poole"; [73] that is correct, is it?

A. That was my conception of it after I received the telegram of March 20th.

Q. And after that correction was made you paid the money to Mr. Poole? A. That is correct.

Q. You don't know anything further about the money after you paid it to Mr. Poole, do you?

A. No, sir.

Q. You don't know whether he went over to Juarez and bet it at the race-track, or what he did with it, do you? A. No, sir; I haven't any idea at all.

Q. What was the form in which the payment was made to Mr. Poole? Did you pay him in cash when he came there for the money or did you pay him by check, or how?

A. I could not positively say about that.

Q. Did you not give him a cashier's check on your bank? A. That may have been so.

Q. And did he not return from time to time and cash these cashier's checks which you gave him?

A. He may have done so.

Q. Did you know what Mr. Poole's business was?

A. No, sir.

(Testimony of J. E. Benton.)

Mr. SELVAGE.—Q. Did you see Mr. Poole subsequently to the time that you gave him this money?

A. Yes, sir.

Q. How long was he in and about El Paso after that? A. I could not say; I don't know.

Q. I mean how late after that did you see him?

A. I saw him on the street one day; it may have been a couple of months ago.

The COURT.—Q. Do you live in El Paso, Mr. Benton? A. Yes, sir.

Q. The City of Juarez is in Mexico?

A. Yes, sir.

Q. How far from El Paso?

A. The Rio Grande River divides the two.

Q. It is just across the river, is it?

A. Yes, sir. [74]

Q. And there is a bridge across? A. Yes, sir.

Testimony of Charles R. Miller, for the Government.

CHARLES R. MILLER, called for the United States, sworn.

Mr. SELVAGE.—Q. What is your name?

A. Charles R. Miller.

Q. Mr. Miller, where do you reside?

A. 1159 Clay Street.

Q. In this city? A. Yes, sir.

Q. What business or occupation do you follow?

A. At the present time I am Assistant General Baggage Agent of the Western Pacific Railway Company.

Q. I hand you three tickets or checks and ask you what those are?

(Testimony of Charles R. Miller.)

A. That is what is termed an excess baggage check. This is transportation passage for a passenger.

Q. Where is this transportation from?

A. It is shown by the stamp on the back; it is supposed to have been sold at Trinidad, Colorado, on September 8th, 1913, by the Denver & Rio Grande Railroad Company.

Q. Do you know what the tariff is between Trinidad, Colorado, and San Francisco?

A. I think the first-class fare is \$42, and the second class is \$35.

Q. State whether or not the passenger is required by your company to sign the ticket, the transportation ticket upon which he travels?

A. Yes, sir, it is customary for the passenger or the agent to have the passenger sign his name on what they call an interline ticket, from one foreign line to another.

Q. And is that one signed by the passenger?

A. It shows here to be "T. J. Moody."

Q. You have already stated the date?

A. Yes, sir, September 8th, 1913.

A. (Continuing.) That would indicate the date it was sold by the agent. [75]

Q. I will ask you to explain these excess baggage checks and what the characters upon the checks indicate.

A. An excess check is printed in three coupons; one is termed the string or strap-head of the check; one portion is the passenger's duplicate, which goes to the passenger, and there is an auditor's stub which

(Testimony of Charles R. Miller.)

the agent retains. The information is shown the same on each portion of the check. This check would indicate that there was baggage checked from Trinidad, Colorado, to San Francisco, via the Denver & Rio Grande Railroad to Salt Lake and the Western Pacific to San Francisco.

Q. Does it show the amount of the excess baggage and the expense of it?

A. It shows here a gross weight of 320 lbs.

Q. And how much excess would that be?

A. There is 150 lbs. freight allowance to each full ticket and 75 lbs. on each half ticket that would be 170 lbs.

Q. One hundred and seventy lbs. excess baggage. What would be the tariff upon the 170 lbs?

A. The excess baggage rates are based on 16 $\frac{2}{3}$ per cent of a first-class fare; it would be about \$7.40 per hundred from Trinidad, Colorado, to San Francisco.

Mr. SELVAGE.—I will introduce this in evidence and ask to have it marked U. S. Exhibit 16 for Identification.

(The document was here marked "U. S. Exhibit 16 for Identification.")

The WITNESS.—I might add this further in regard to this: this shows a collection of \$2.60 for excess of size.

Q. I was going to ask you to explain what that means.

A. The railroads since June 1, 1913, charge on baggage—any trunk or anything in excess of 45

(Testimony of Charles R. Miller.)

inches—at the rate of 5 lbs. for each additional inch; so this would indicate a trunk of 7 inches above 45 inches; that would be 35 lbs; 5 lbs. for each additional inch above the 45. [76]

Mr. SELVAGE.—I will introduce these in evidence for identification in the same way.

(The two documents were here marked “U. S. Exhibits 17 and 18 for Identification,” respectively).

Cross-examination.

Mr. PRICE.—Q. Any trunk then that would measure more than 45 cubic inches—

A. 45 inches.

Q. 45 cubic inches, that would be subject to excess baggage? A. 5 lbs. for each additional inch.

Q. 5 lbs. for each additional inch over the 45 inches? A. Yes, sir.

The COURT.—Q. Would that be cubic inches? Do you mean in length?

A. In length. The average trunk would run about 30 inches.

Q. Not cubic inches?

A. In any direction, height, length, width.

Q. Counsel was asking you about cubic inches?

A. Oh, no.

Q. It is 45 inches in any direction, either in length, breadth or thickness? A. That is the idea.

Mr. PRICE.—Q. And if it should be in excess in each of those measurements, or in any one, and particularly if it should be in excess in each of those dimensions, would a charge be made for each of them?

(Testimony of Charles R. Miller.)

A. Yes, sir, in either direction; if it be 45 inches square there would be the two directions, the width and the length.

Q. Mr. Miller, you don't know anything about what the baggage referred to by these checks contained?

A. No, I would be unable to identify the baggage.

Q. The usual excess baggage checks?

A. Yes, sir.

Q. It quite often happens that excess baggage is paid? [77]

A. Probably one trunk out of every 100 must have an excess check.

Q. Now, as to the number of passengers out of every 100, how many would probably pay excess baggage?

A. Well, nowadays I should think that there are only about one-half of the people who have any check baggage; they travel with suit-cases and as a rule they carry them with them.

Q. Referring to the people who travel usually with trunks, making a transcontinental trip, or making a trip from one place to another for the purpose of staying, people who do carry trunks, have you any idea as to the number of people?

A. One-half of them.

Q. Out of those who do carry baggage, how many would you say pay excess baggage?

A. Those who have actual baggage checks, it is about one in every one hundred pay for excess weight, about one or one and a half.

(Testimony of Charles R. Miller.)

Q. And that makes the excess baggage department quite a large department, does it not?

A. Well, no. Do you mean with reference to excess collections?

Q. Yes.

A. It requires very little extra work; while the ordinary check would be stamped, say in this case from Trinidad to San Francisco, that is all there would be to it; for the extra weight you have to show the weight, the excess rate, the number of tickets and the amount of collections.

Redirect Examination.

Mr. SELVAGE.—Q. State whether or not your attention was called to the excess baggage of George Poole, or George Moore here, along about in September—Murphy, I should say—along in September.

A. I have a recollection of one of the employees of the baggage-room, the general baggage office is upstairs on the second floor of the Ferry Building, the baggage room where we receive and deliver baggage [78] is down underneath; one of the employees in this room came up to our place on an errand and he stated that there were a couple of customs officers down there regarding some baggage, or a couple of trunks, with some dope in it; he jokingly made the remark, "It passed me" or "I didn't get it," or something of that kind.

Q. You need not state what was said, but simply whether your attention was called to it.

A. It was.

Mr. PRICE.—Q. Whose baggage was it that your

(Testimony of Charles R. Miller.)

attention was called to? A. There was no name.

Q. Then in answer to the question of Mr. Selvage, you said your attention was called to the baggage of Mr. Murphy, and you answered "yes," did you mean your attention had been called to the baggage of Mr. Murphy?

A. No, the baggage was not identified as being that of any particular owner.

Q. Then you do not know whose baggage it was that was referred to at that time?

A. I could not say.

Mr. PRICE.—We move to strike out all the testimony with reference to that baggage.

The COURT.—Let it go out.

Testimony of Joseph Head, Recalled for the United States.

Mr. SELVAGE.—Q. Mr. Head, I call your attention to one of the slips of paper that was introduced for identification and ask you whether or not you ever saw that particular piece of paper before or whether that was with those that you found?

A. Yes, sir.

Q. Where did you say you found this?

A. It was given me by Mr. Walsh at the ferry.

Q. In the presence of the defendant?

A. Yes, sir.

Q. Which defendant? A. Mr. Murphy.

Q. Was any statement made as to where he got it?

[79]

A. Mr. Murphy did not claim any ownership of these at the time.

(Testimony of Joseph Head.)

Q. I asked you if Mr. Stevens or Mr. Walsh states where they got it.

A. Oh, yes, that they got it at 30 Waverly Place.

Q. And that was right in the defendant's presence, was it? A. Yes, sir.

Mr. SELVAGE.—I now offer this in evidence; I will read it to the jury.

Mr. PRICE.—No objection.

Mr. SELVAGE.—“Deposited with Walker Brothers, Bankers, for credit, Salt Lake City, Utah.” Then there is the usual denominations, gold, silver, currency and so forth; the pencil writing upon it is what I wish to read. “Furg. 20, Yee Yet Ray 20. Odo ra 5 Trinidad 2055; Ejan 1-90; ticket to S F 44:20. Excess 17.02. Pullman 50 B O Baggage 10. Aced 85 Brushes 50.

My draft 200.” Endorsed: “340.

150

190

40-8 inch

0230

540

25 Letter to San Antonio;

Advance to Frank;

5 “ “

Stockings; 20.55 ticket Trinidad:

Ticket and berth to —”

Have you studied this, Mr. Head? A. Yes, sir.

Q. I wish you would read it.

Mr. DANFORD.—If your Honor please, if counsel is willing to expediate matters, if counsel for the

(Testimony of Joseph Head.)

Government will state what the purpose of this is we might stipulate to it.

Mr. SELVAGE.—It is the price of these tickets from Trinidad to San Francisco, and the excess baggage that shows upon these tickets, and that shows in that notation just the same. It is simply the different items of expenditure, being fare and otherwise in his trip from El Paso via Trinidad to San Francisco. It is just to match these tickets; they are identical with the notations upon the tickets.
[80]

Mr. PRICE.—We object to that statement, if your Honor please.

Mr. SELVAGE.—You asked me to make that statement. You stated that that might be stipulated. If they want to stipulate to that, I am willing to stipulate to it.

Q. Just kindly read that writing from the top down.

A. "25 Letter to San Antonio. 250 advanced to Frank. 5 advanced to stockings. 20/55, ticket to Trinidad and berth to Albuquerque—supposed to be Albuquerque. 125 advanced expense money. expenses Charlie's help. 465."

Q. You also found this book, will you kindly examine that book and state whether there is an item there relating to Chang Kow?

A. The book contains the entry of Quon Fat Hong Company, and underneath the figure 30.

(Testimony of Joseph Head.)

Q. Do you know that company? A. Yes, sir.

Q. What company is it?

A. It is a Chinese firm at 30 Waverly Place, San Francisco.

Q. Do you know what their business is?

A. They have not any business that I know of, outside of the opium business.

Mr. SELVAGE.—That is all.

Mr. PRICE.—No cross-examination. Yes, one moment, Head, I want to ask you about a few matters, I want to ask you one or two questions.

Q. Mr. Head, you stated that the business of this Chinese firm was the opium business; do you know whether they have any other business, or not?

A. I don't know of it, if it exists, or did exist.

Q. And do you know that of your own knowledge?
[81]

A. There is no evidence in the store of any other merchandise to conduct any other business.

Q. Did you find any opium in there?

A. No, sir.

Q. Then how do you know that they are engaged in the opium business?

A. From a study of their records taken from their office.

Q. And you don't know anything about it from your own knowledge, and you have never seen any opium in there; is that correct?

A. I know of my own knowledge because I have taken the books and had them translated and saw the translation made by the Immigration Interpreters.

(Testimony of Joseph Head.)

Q. Book knowledge is the only knowledge you have, what you gained from the books; is that correct? A. That is correct.

Q. You never have seen any opium in the place, have you? A. No, sir.

Q. Did you ever see any cigars in there?

A. No, not any great amount.

Q. Have you see any cigars in there, Mr. Head?

A. I may have; I could not swear to that. I may have seen a small amount.

Q. Have you seen any tobacco?

A. I may have seen a small amount.

Q. Have you seen shoes in there?

A. My answer would be the same to that.

Q. You may have seen shoes in there?

A. I may have seen a small number.

Q. Have you seen rice in there? A. Yes, sir.

Q. Then, Mr. Head, why do you say they have no other business?

A. Because the quantities of these goods I have mentioned are not enough to conduct a business with; they are for their own use in the store.

Q. But they have a store and they are on shelves, are they not? A. No, sir. [82]

Q. Any shelves in there? A. Yes, sir.

Q. They might have had large quantities of stuff in there for all you know, cigars and tobacco and rice, at some time or another.

A. Not at the time I visited the store.

Q. But they may have had them at some time; they may have had them the day before?

(Testimony of Joseph Head.)

A. Yes, sir.

Redirect Examination.

Mr. SELVAGE.—Q. How long since you first visited that store, Mr. Head?

A. The evening of September 16.

Q. Just state to the jury what condition you found that store in, that is, about the size of it, and the rooms that were connected with it, and the amount of merchandise, if any, you found there.

A. Well, it may have a frontage of 10 or 12 feet and a depth of between 30 and 40. It is a small store. My impression of visiting the store, which has not changed on the other visits, is what we call in Chinatown circles as a dummy store.

Q. And you say they were in the business of opium, was there any other evidence that you had of it, other than what you have stated?

A. From a knowledge of information that other inspectors had given me regarding the place.

Q. Do you know what the general reputation is?

A. Since the evening of September 16th I do, but not before.

Q. What has it been? A. An opium place.

Testimony of Charles W. Dixon, for the Government.

CHARLES W. DIXON, called for the United States, sworn.

Mr. SELVAGE.—Q. Where do you live?

A. San Francisco, 230 Devisadero Street.

Q. What is your business?

A. Transfer and storage. [83]

Q. Do you know the defendants here, either one

(Testimony of Charles W. Dixon.)

of the defendants Mr. Pool or Mr. Andrews?

A. I don't believe I do.

Q. You don't recall their names at all?

A. No, sir.

Q. State whether or not you had ever transferred any baggage from the Western Pacific to a hotel for George Poole or for Andrews, or Murphy.

A. No, not that I know of by those names.

Q. Not by those names? A. No, sir.

Q. Did you upon any tickets or any check transfers?

A. Let me see,—yes, these checks went through my hands. My stamp is on the back of them.

Q. Would you know the baggage if you saw it?

A. No, I don't know exactly the baggage. A time before I was shown a trunk they showed me that trunk downstairs.

Q. That was one of the trunks?

A. They showed it to me downstairs, yes, sir.

Q. Was that one of the trunks that you handled?

A. That is hard for me to say because I don't handle the baggage; I run the office.

Q. State whether or not there was anything upon the trunk which you can identify it by as having been handled by you?

A. I seen a trunk like that downstairs that had one of my stickers on it. That is the one.

Q. That is the one?

A. That is one of my stickers.

Q. Do you know what you did with the trunk?

(Testimony of Charles W. Dixon.)

Q. Well, I did not handle the trunk; I don't handle the trunks.

Q. Who handled it?

A. One of my men handled it, I suppose; it went through the office.

Cross-examination.

Mr. DANFORD.—Q. So far as your personal knowledge is concerned, and your recollection, you don't identify these trunks at all you merely identify tickets? [84]

A. Those tickets have been through my hands.

Q. But you don't associate these trunks with these tickets, of your own knowledge?

A. No, I never can tell by the trunk what the ticket calls for.

Mr. SELVAGE.—Q. Except for the sticker on it.

A. Only the sticker.

Testimony of George Cassidy, for the Government.

GEORGE CASSIDY, called for the United States, sworn.

Mr. SELVAGE.—Q. Where do you reside?

A. 331 Hickory Avenue.

Q. In this city? A. Yes, sir.

Q. State whether or not you ever saw these checks before. A. No, sir.

Q. You never saw them personally? A. No, sir.

Q. Did you ever handle any baggage for Mr. Poole or Mr. Andrews or Mr. Murphy, some large trunks? A. I don't know the names.

Q. Do you know this trunk? A. Yes, sir.

Q. Did you ever handle it? A. Yes, sir.

(Testimony of George Cassidy.)

Q. Where did you handle it?

A. From the Western Pacific to the Thames Hotel.

Q. For whom did you handle it?

A. I don't quite remember the name of it.

Q. Do you recognize any of the men here?

A. I never saw the men; I saw in the office at the time they came in, but I was at the desk reading; I never saw the men.

Q. How many trunks did you take?

A. Two trunks.

Q. You recall the long one? A. Yes, sir.

Q. Would you recall any other?

A. No, sir; it was something of a square trunk, but I may have handled 200 or more of them, and I don't remember it. [85]

Q. Is this other one an unusual trunk?

A. Yes, sir.

Q. State with reference to its weight.

Q. It was rather weighty; I had to get some fellow to put it on the wagon.

Q. That was when it came into San Francisco?

A. Yes, sir.

Q. With reference to its weight, what would you say its weight was?

A. That is a hard thing to do, to guess the weight of a trunk; I should say maybe 190 lbs. or so.

Q. Do you recall who you delivered those trunks to? A. The Thames Hotel.

Q. Do you recall who you delivered them to at the Thames Hotel?

(Testimony of George Cassidy.)

A. Yes, the landlady's daughter; she let me in the room.

Q. Do you know her name?

A. I only know her first name.

Q. What is it? A. Marie.

Q. Do you recall the date of the delivery of the trunk?

A. I think it was about the 11th of September, on our books.

Cross-examination.

Mr. PRICE.—Q. You say you got these trunks where? A. From the Western Pacific.

Q. Have you ever seen a trunk like that before?

A. Well, I have seen them before, but I have never handled one like it before.

Q. Are you positive that is the trunk you handled?

A. Yes, sir.

Q. How do you identify it? Is there any particular mark on it?

A. Well, no, but by the shape of the trunk and the hardware, it is marked "hardware" on it.

Q. Do you know whether that is the trunk that was marked "hardware" that you handled, or whether it was somebody else's trunk that might have been marked "hardware"?

A. It was a trunk like that. [86]

Q. And you don't recall the men who came into the Thames Hotel there that day and asked you to haul some trunks for them?

A. They never came into the Thames Hotel to me.

Q. Where did they come to?

(Testimony of George Cassidy.)

A. They never spoke to me; to Mr. Dixon.

Q. And Mr. Dixon sent you after some trunks?

A. He did not send me then, it was later on.

Q. Well, in the usual way he gave you the order.

A. He gave me the checks to get the trunks.

Q. Then you went and delivered them to the landlady's daughter of the Thames Hotel?

A. Of the Thames Hotel.

Mr. SELVAGE.—Q. Do you recall the room number? A. I think 22.

Mr. PRICE.—Q. You state that this was room 22? A. Room 22, I believe; it was a corner room.

Q. Do you remember that from your own independent recollection or has your mind been refreshed on that subject to-day?

A. No, I remember it from the last time, when they came to see about the hauling of this baggage.

Q. And you remembered then it was room 22?

A. Room 22, a corner room.

Testimony of Marie Nelson, for the Government.

MARIE NELSON, called for the United States, sworn.

Mr. SELVAGE.—Q. Where do you reside?

A. San Francisco.

Q. What is the character of the building? Is it a hotel? A. Hotel, yes.

Q. Who is running the hotel? A. Mrs. Smith.

Q. Do you remember of a long trunk being delivered there? A. Yes. [87]

Q. Do you recognize the trunk? A. Yes.

Q. Where is it? A. Right there.

(Testimony of Marie Nelson.)

Q. You recognize that trunk? A. Yes, sir.

Q. That was in September last?

A. September 11th.

Q. Do you know the man who delivered it there—
I mean who owned it, who had it there? A. Yes.

Q. Do you see him here in the room? A. No.

Q. Do you know what his name is?

A. J. A. Spencer; he is registered by that name.

Q. Now, I will ask you whether or not he signed
the register in your hotel; did he sign the register
in your hotel? A. Yes.

Q. I call your attention to the name upon this list,
J. A. Spencer; is that correct? A. Yes, sir.

Q. Is that the name that he signed?

A. Yes, that is the name.

Q. I will ask you whether or not this gentleman
sitting over here at the table, the smooth-faced
gentleman looking toward me, looks anything like
the man? A. Yes.

Q. Is he the man? A. Yes.

Q. How long did he stop at your place at that
time? A. A week.

Q. Did he have any other trunk?

A. Yes, he had two trunks.

Q. Did you pay any attention to the trunks after
he got them in the room? A. No.

Q. Would you know the other trunk if you would
see it? A. I guess I would.

Q. Which is it, if it is here?

A. I think that is the one right there.

Q. A trunk like this one here, referring to "United

(Testimony of Marie Nelson.)

States Exhibit 5 [88] for Identification''?

A. Yes, sir.

Q. What was the number of the room he occupied?

A. Twenty-two.

Q. Where is it located? A. 74 Turk Street.

Q. And with reference to the building itself, where is the room? A. A front room.

Q. Is it a corner room?

A. Yes, sir, on the corner.

Q. During the time this man Spencer was at your hotel, did you see him carrying anything to or from the room? A. No.

Q. When were the trunks removed from there.

A. On the 17th day of September.

Q. The 17th? A. Yes.

Q. Did you notice what the weight of those trunks was, did you handle them at all? A. No.

Q. Did you see them handled? A. Yes.

Q. You did see them handled? A. Yes.

Q. Do you know anything about whether or not the trunks went away as heavily laden as when they came, or otherwise? A. No.

Q. You do not know? A. No.

Q. Who took them away? A. I don't know.

Q. Did you see them taken? A. Yes.

Q. You mean you don't know the expressman who took them? A. No.

Q. Did you notice the man who handled them take them away? A. Yes.

Q. From the appearance of handling them when they were taking them away, state whether or not

(Testimony of Marie Nelson.)

one man carried them or two or how it was.

A. Just one man.

Q. Just one man carried them when they were taken away. A. Yes.

Q. When they came in how were they handled,—did you notice? A. No, I did not notice. [89]

Q. You did not notice that? A. No.

Cross-examination.

Mr. PRICE.—Q. A moment ago Mr. Selvage asked you if the gentleman was in the room who had these trunks brought up there, and you said no, did you not? A. Yes.

Q. He is not in the room? A. No.

Mr. SELVAGE.—Q. Did this man who rented your room say anything about a brother? A. No.

Q. Did you see anybody visit him there?

A. Yes.

Q. Who visited him there, do you know?

A. I don't know.

Q. What called your attention to the fact that there was somebody visiting him there?

A. Because I saw him go upstairs.

Q. Was it often, or seldom, or what; how often did you see him? A. Oh, I only saw him once.

Q. Would you recognize the man whom you saw go there? A. I don't think I would.

The COURT.—I don't understand you, Miss Nelson; you say at one moment that the man who rented this room is not now in this room: is that true?

A. No.

Q. What do you mean then?

(Testimony of Marie Nelson.)

Mr. SELVAGE.—She said first she did not see him in the room.

The COURT.—But she just answered to counsel that he is not in the room?

Mr. SELVAGE.—I did not hear that answer.

Mr. PRICE.—Q. You said you saw somebody coming up to room 22 that was occupied by someone along about this time; that is not a very unusual thing, is it, for somebody to go to somebody else's room? A. No.

Q. It is not unusual? A. No.

Mr. SELVAGE.—Q. Now I want to understand about this answer. [90] Mr. Reporter, will you read those questions?

(The first two questions and answers on cross-examination were here read by the reporter.)

Q. Who did you mean by that,—the man who brought the trunks up, when you answered no, he was not in the room? Did you have reference to the man who occupied the room or to the expressman who brought the trunks; do you understand what I say?

A. No.

Q. Do you recognize the man who occupied that corner room? A. Yes.

Q. Where is he? A. There (pointing).

Q. Then he is in the room? A. Yes.

Q. Who did you have reference to there when you said he was not in the room? Do you understand me? A. No.

Q. The defendant's counsel here asked you a question which the Reporter has just read to you and you

(Testimony of Marie Nelson.)

answered that the man was not in the room; what did you mean by that? You do not understand what I have reference to? A. No.

Q. Then you say the man is here in the room?

A. Yes.

Q. And you point him out as which one?

A. Right there (indicating).

Q. The man sitting there beside the man at the end of the table? A. Yes.

Q. (Addressing the defendant.) Mr. Murphy, will you kindly stand up. Is that the man? A. Yes.

The COURT.—Q. I understand you to say that, Miss Nelson, this gentleman registered at your hotel under the name of Spencer and stayed there a week?

A. Yes, sir.

Mr. SPENCER.—Q. And those trunks were in his room, were they? A. Yes.

Mr. PRICE.—Q. How often did you see the gentleman who occupied room 22, during that week?

A. I guess every day.

Q. You saw him coming and going?

A. Yes. [91]

Q. You saw him passing in and out from time to time? A. Yes.

Q. Just as any other roomer in the house; you saw him just the same as you did anyone else rooming in the house? A. Yes.

Q. Miss Nelson, you state these dates very accurately; has your memory been refreshed on that? Have you had conversation with anyone recently with reference to coming here and giving testimony?

(Testimony of Marie Nelson.)

A. No.

Q. Have you talked with anyone at all with reference to coming here and giving testimony? That is all. We excuse the witness.

Testimony of Joseph Head, Recalled for the United States.

Mr. SELVAGE.—Q. State whether or not you have seen the handwriting of the defendant, Andrews.

A. Yes, sir.

Q. Do you know his handwriting when you see it?

A. Fairly well.

Q. I will call your attention to the signature of this register again; I will ask you whether or not you recognize the handwriting on the ticket that purports to be from Trinidad, Colorado, to San Francisco?

A. I can testify to the capital letters; some of the small letters I could not testify to.

Q. You know that they are the same as what?

A. The same as the capital letters in his book that was found at 30 Waverly Place.

Q. It is the same handwriting? A. Yes.

Q. What book besides the register did you see his writing in?

A. That book that was found by the police officers at 30 Waverly Place.

Q. State what entries in that book you recognize as his handwriting?

A. The word "Denver" in this book is almost absolutely the same as on the ticket. The word "Denver" is on the ticket—or I mean I should say on this hotel register. [92]

(Testimony of Joseph Head.)

Q. Is there anything peculiar about the making of any of his letters?

A. The making of the capital "J" is always the same. He has a distinct way of making the letter "J."

Q. And in the book here is the word "Juarez"?

A. Yes, sir.

Mr. SELVAGE.—I wish at this time to introduce these three in evidence to show the handwriting of the defendant Murphy.

Mr. PRICE.—Q. Mr. Head, you are not a handwriting expert are you? A. No, sir.

Q. Have you ever seen any of the writing made by Mr. Murphy, and if so, where have you seen his writing? A. Except as I have stated.

Q. This is all of his writing that you have seen; is that it?

A. I have seen some letters that we found in the room of George P. Moore.

Q. Just from these letters, and these odd bits of stuff you picked up, that leads you to say you can identify his handwriting: is that it?

A. I say there is a similarity.

Q. A similarity? A. Yes, sir.

Q. Then you do not say positively that this is Mr. Murphy's handwriting, or this is Mr. Murphy's handwriting; you simply state there is a general similarity; is that what you mean to say?

A. Well, I express it a little stronger; there is a marked similarity, marked characteristics.

Q. And you base that simply upon these bits of

(Testimony of Joseph Head.)

stuff you picked up; is that correct? A. Yes, sir.

Q. The stuff you have concluded to be in Mr. Murphy's handwriting? A. Yes, sir.

Q. You base that then upon statements of the conclusion which you have come to; is not that correct?

A. Yes, I make the statement on the conclusions I have arrived at after looking at these different samples of the writing. [93]

Q. Have you ever seen Mr. Murphy sign his name?

A. No, sir.

Mr. SELVAGE.—I offer these in evidence and ask to submit them to the jury to examine them and to note the characteristics of the handwriting.

Mr. CAMPBELL.—If your Honor please, we object to the introduction of these matters at this time upon the ground that it is immaterial, irrelevant and incompetent, and that so far there has been no foundation laid for them and that the *corpus delicti* of this charge laid in the information has not been established.

Mr. DANFORD.—And the witness admits he never saw the handwriting of Murphy.

The COURT.—But the witness last on the stand testified he signed that name in the register, and this witness has compared that with the other signatures.

Mr. DANFORD.—This witness admits he never saw the handwriting of Murphy.

The WITNESS.—No, sir, I take exception to that.

The COURT.—He said he never saw him write.

THE WITNESS.—Yes, your Honor, that is it.

The COURT.—The witness who just left the stand

(Testimony of Joseph Head.)

testified that Murphy wrote his name in the register, "Spencer."

Mr. DANFORD.—Then that would be the witness to put this in under, if at all. This witness does not know the handwriting, of his own knowledge.

The COURT.—No, of course he does not.

Mr. DANFORD.—We submit then that the foundation is not laid.

The COURT.—Sure the foundation is laid because the witness has testified that he compared this writing with the writing in dispute and gives his opinion as to whether or not it is written by the defendant. The objection is overruled. [94]

Mr. DANFORD.—Very well, your Honor.

Mr. SELVAGE.—I will submit the signature on the ticket and the name "Juarez" in the book, on this page, the capital J's.

Testimony of Louis Sang, for the Government.

LOUIS SANG, called for the United States, sworn.

(JOHN ENDICOTT GARDNER sworn to act as Interpreter.)

Mr. SELVAGE.—Q. Where do you live?

A. Oakland, 389 Sixth Street, Oakland.

Q. Do you know these men here, these defendants, Andrews and Poole? I will ask these men to stand up. A. I do.

Q. How long have you known them?

A. Between 3 and 4 years.

Q. Did you have any business relations with them?

A. I have bought opium from them.

(Testimony of Louis Sang.)

Q. I will ask you if you recognize this letter which I now hand you (handing)?

A. I recognize the letter as one that has come to me through the post.

Q. Do you know the handwriting—who it is from?

A. I cannot say that I recognize the handwriting, but the name of the writer is there.

Q. Who is the writer?

A. It is under the name of Walker.

Q. Is the man here in the room who wrote that letter?

A. Of those two men there it is the one on the left-hand side.

Q. It is the one next to the end of the table. I will ask you whether or not you recognize this letter that I now hand you (handing).

A. Yes, sir, this is my answer to his letter.

Q. Is it the answer to the letter that I have just shown you? A. Yes, sir.

Q. Will you tell the man to stand up who wrote this letter? The one who wrote this letter, I want him to stand up. You point to him.

A. That man (pointing). [95]

Q. Is that the man?

A. Yes. I knew him in the correspondence as Walker, Tom Walker.

Q. And this is the man, is it?

A. He is the man.

Q. The man who is pointed out now is the man who is known in this case as Murphy or Andrews. I wish at this time to read these letters to the jury.

(Testimony of Louis Sang.)

Mr. CAMPBELL.—If your Honor please, I desire to interpose the same objection to these letters being read to the jury at this time or introduced in evidence upon the ground that they are immaterial, irrelevant and incompetent and that the proper foundation has not been laid, and that the *corpus delicti* has not yet been established.

The COURT.—The objection is overruled.

Mr. DANFORD.—We note an exception.

The COURT.—The objection is overruled but I do not understand that this reply—where did that come from?

Mr. SELVAGE.—This reply is the reply he wrote to the defendant.

The COURT.—I understand, but how does that bind the defendant?

Mr. SELVAGE.—I don't know the extent to which it would bind him.

The COURT.—Did he receive it? Did it come from his custody or is this a copy that the witness retained?

Mr. SELVAGE.—I have not learned yet.

The COURT.—You had better learn it. The letter which he says was received from the defendant Murphy under the name of Walker may be admitted in evidence.

Mr. SELVAGE.—I will go further into that as soon as I read the letter, because I am going to ask questions in reference to the letter.

The COURT.—This letter was received from Walker. Let me [96] see it. Is there anything

(Testimony of Louis Sang.)

in it bearing on this case? Oh, yes, read it.

Mr. SELVAGE.—It reads:

“El Paso, Texas, May 19, '13.

Friend Louie: Your friend Fong Chin in Juarez spoke to me in regard to a letter he received stating that you want to see either George or myself about handling some goods for you out of Guaymas, Mexico by boat. Things are in bad shape around Guaymas as there is no goods coming out of there by railroad and your boat route may be O. K. The railroads are all tied up south of Chihuahua City and there has not been any shipments of *goods* into Juarez for about three weeks. I just returned from a stop in New York City, and George has left. Before I arrived he left. He left word he would be back in about a week, so if you still want to go through with that proposition let me hear from you at your earliest convenience and I will come to San Francisco and talk the matter over. I am,

Very truly,

TOM.”

Address, Thomas Walker, Texas, 210½ Broadway, El Paso.

Q. What business had you referred to in your letter that *he speaking* about here? A. Opium.

Q. Where did this answer that I have here come from—do you know anything about it?

A. I wrote this to send to the party that wrote the letter, in answer to this letter, but I tore it up afterwards and the officers picked the pieces up from the waste-paper basket.

(Testimony of Louis Sang.)

Mr. SELVAGE.—Then it is not admissible; we do not present this at all.

Mr. DANFORD.—Now, if your Honor please, I move to strike out the reply as to what this business referred to. He answered “opium.” I move to strike that out upon the ground that there is no foundation laid and nothing to show in the instrument itself, which would be the best evidence of that it would refer to. [97]

The COURT.—It does not show, and therefore the failure to show may be supplied by parol proof, which is done hereby saying he referred to opium as the goods he desired to have handled. The motion will be denied.

Mr. DANFORD.—Exception.

Mr. SELVAGE.—Q. Do you know who it is he refers to in this letter by the name of George?

A. The one with the glasses on.

Q. Which defendant is it? I will ask that the defendant with the glasses on stand up, so that I can have it in the record—is this the man, George Poole? A. That is the man.

Q. I call your attention to some receipts here pasted upon a paper and ask you if you saw these before. First, I will ask you is this letter in the handwriting of Mr. Andrews or Murphy?

Mr. PRICE.—We object to that. It is not shown that the witness is familiar with the handwriting.

Mr. SELVAGE.—I will show that.

Q. Did you receive many letters from Mr. Walker?

(Testimony of Louis Sang.)

A. No, this is the only one that I have received from him.

Q. Did you ever see him write? A. No.

Mr. SELVAGE.—I will offer this letter in evidence.

(The letter was here marked “U. S. Exhibit No. 19.”)

Q. I call your attention to these receipts; what are they, if you know?

A. Receipts for money I sent.

Q. Money you sent to whom? A. To George.

Q. This defendant here, George Poole?

A. Yes.

Where did you send it to?

A. To El Paso, on the American side.

For what was that money sent to this man, this defendant? A. For opium.

Q. What was he to do with the opium; what was the defendant to do with the opium?

A. I sent him the money and he was to let me have the opium. [98]

Mr. SELVAGE.—I offer that in evidence, these two receipts that he has just recognized and testified regarding. I wish to read them at this time to the jury.

Mr. PRICE.—We have no objection.

Mr. SELVAGE.—(Reading:) “Stockton, Cal., March 14, 1913. Received from George Sandees”—

Q. Who is George Sandees?

A. That is the name I was to be known by.

Mr. SELVAGE.—(Reading:) “\$300. t. t. to First

(Testimony of Louis Sang.)

National Bank, El Paso, Texas, \$300; San Joaquin Valley Bank, J. R. Koch, Assistant Cashier."

The other one reads as follows: "Stockton, Cal. March 20, 1913. Received of George Sandees \$100 t. t. to First National Bank. El Paso, Texas; San Joaquin Valley Bank, J. R. Koch, Assistant Cashier."

(The document was here marked "U. S. Exhibit No. 20.")

Q. I will call your attention to other receipts and ask you what those are?

A. The receipt below is not connected with this affair; the one above is for an amount that he borrowed from me.

Q. Who borrowed the money from you?

A. George.

Q. I call your attention to a telegram and ask you if you recognize it, and if so, state what it is?

A. I recognize the telegram as one asking for \$100.

Q. Who, if you know, sent that telegram?

A. George Poole.

Q. To whom did he send it? A. To me.

Mr. SELVAGE.—I offer this in evidence.

Mr. PRICE.—No objection.

Mr. SELVAGE.—It reads: " G. S. 51; 13 via Nogales Junction, Guaymas, Mexico, July 16, 12. Louie Sang, 804 Grant Avenue, San Francisco, California. Wire money your agent quick \$100 option. Will wait until tomorrow. G. P. O. 1221."

(Testimony of Louis Sang.)

(The document was here marked "U. S. Exhibit No. 21.")

Q. I call your attention to a letter dated August 8, 1912, and ask you to state what it is.

A. I do not know for whom the name "J. J. Magee" stands.

Q. Do you know who wrote the letter?

A. At first when I received the letter I did not know from whom it came, and I just laid it aside.

Q. Did you afterwards learn from whom the letter came? A. I could not find out.

Q. I call your attention to another letter dated August 10th?

A. This letter I received from Poole.

Mr. SELVAGE.—I offer this in evidence at this time as being a letter which Louis Sang received from Poole.

Mr. PRICE.—We have no objection.

(The letter was here marked "U. S. Exhibit No. 22.")

Mr. SELVAGE.—(Reading:) "California Limited, Santa Fe. En route, August 10. L. Sander"—to whom did he refer by the name L. Sander?

A. To myself.

(Reading:) "Sir. Owing to some trouble at the mines I have been unable to get cars so have been unable to place your one hundred dollar option but I think I will be able to deliver to you in a short time. G.P.O."

Q. What did that letter refer to, what did the word "option" refer to?

(Testimony of Louis Sang.)

A. That \$100 had reference to a promise that he made that he would get me some watches.

Mr. SELVAGE.—That is all.

Cross-examination.

Mr. PRICE.—If your Honor please, the cross-examination of this witness may take some time. The hour is growing late. Will we go ahead now?

The COURT.—Yes. [100]

Mr. PRICE.—Q. Louis Sang, you live in Oakland, do you say? A. Yes, sir.

Q. How long have you lived over there?

A. Since last year.

Q. What do you do? A. I am a merchant.

Q. What line of business are you particularly carrying on? A. General merchandise.

Q. General merchandise; you handle everything?

A. Yes.

Q. And you handle opium? A. No.

Q. You do not handle opium; you never have handled opium? A. No.

Q. Have you had any trouble at all with the revenue authorities? A. Never.

Q. They have been to see you a number of times about this particular case? A. No.

Q. Have they been to see you at all?

A. They came to my home a month ago to make a search.

Q. Did they come again after that? A. No.

Q. What did they say to you when they came to your house?

A. They went right to work to search my house;

(Testimony of Louis Sang.)

they did not say anything to me.

Q. Did they say why they were searching your home? A. Afterwards they did.

Q. What did they say?

A. That they suspected me of being an opium smuggler.

Q. They told you that they suspected you of being an opium smuggler; is that correct?

A. That is what they said.

Q. You knew what was meant by opium smuggler, did you not? A. Somewhat.

Q. Did they say anything to you about arresting you for being an opium smuggler?

A. They took me into custody that day.

Q. They arrested you for being an opium smuggler? [101]

A. They said they would take me in on suspicion.

Q. And you denied being an opium smuggler?

A. I told them I was not in that business.

Q. Were you not the manager of the Tee Suey Wong Co., along sometime in 1909, or somewhere along about that time, a few years ago?

A. No, I was a member of the Sue Chung Wing & Company.

Q. When the officers arrested you, where did they take you?

A. At first to the Alameda County Jail.

Q. How long did they keep you in there?

A. Overnight.

Q. They talked with you about this case, did they not? A. No.

(Testimony of Louis Sang.)

Q. They did not say a word to you about this case?

A. There was no one there to ask me any questions.

Q. Did you talk with the officers then at all, anywhere, about this case? A. No.

Q. You never have talked to a single soul, about this case; is that correct? A. No.

Q. Then this is the first time you have made a statement about this case? A. Yes.

Q. Did not the officers tell you that if you would not come here and testify in this case, that you yourself would be prosecuted?

A. All I received was a paper to come here to testify. I did not even know what the occasion was for me to come here today except from this paper. The marshal handed me this, or left it with me.

Q. Then you deny, do you, that the officers asked you to come here and testify and told you that if you would come here and testify you would not be prosecuted?

A. They never said anything like it.

Q. Has anyone else besides the officers talked to you? A. I don't understand you.

Q. Has anyone else besides the officers asked you to come here and give evidence on behalf of the Government in this case? [102]

A. No, I did not know anything about it until I got my subpoena. It had the name of Enlow—it had the name Andrews Thomas Andrews. I didn't know of any such case as that.

Q. You never handled opium, you say? A. No.

Mr. DANFORD.—If your Honor please we would

(Testimony of Louis Sang.)

like to excuse the witness now and then recall him for further cross-examination.

The COURT.—No. Proceed with the cross-examination.

Mr. PRICE.—Take the witness.

Mr. SELVAGE.—That is all.

The COURT.—That is all.

(An adjournment was here taken until to-morrow, Saturday, November 22, 1913, at 10 A. M.)

Saturday, November 22, 1913.

Mr. PRICE.—If your Honor please, we would like to recall Mr. Louis Sang for a question or two.

The COURT.—For more cross-examination.

Mr. PRICE.—Yes, sir.

The COURT.—No, sir, you can't do it. You had him on the stand here yesterday and you concluded with him and he was dismissed. Call the next witness.

Testimony of F. W. Lynch, for the Government.

F. W. LYNCH, called for the United States, sworn.

Mr. SELVAGE.—Q. Where do you reside?

A. San Francisco; 155 Downey Street.

Q. What is your business or occupation?

A. Clerk in the Marine Division, Custom-house.

Q. Any other position?

A. No, sir; at other times I have collected on the Front and had various other duties in the Custom service. [103]

Q. State whether or not you are familiar with the Spanish language?

(Testimony of F. W. Lynch.)

A. I am fairly familiar with it; I am able to speak and read it; I have a practical knowledge of it.

Q. Do you know the meaning of the word "Amapol"? A. Yes, sir.

Q. What is it?

A. The word as given in the dictionary is "amapola" and that means poppy. I had heard the word before but it passed out of my mind. It means poppy.

Q. Is there any definition given of it?

A. There is another definition given, poppea.

Q. Is there anything further given in the definition about a sleeping plant?

A. No, sir; I will just describe it. I remember it distinctly. In the dictionary amapola is given as poppy, poppea; that is all. If you turn to "poppy" you will find the Spanish word "amapoppea," which means sleeping plant, and also amapola. In regard to amapol, people are careless and they sometimes drop a syllable.

Cross-examination.

Mr. PRICE.—Q. Where have you studied the Spanish language?

A. I was born on a sheep ranch in Southern California, and most of my father's employees were Mexicans. My mother taught me. I have also taken Spanish lessons. I have studied Spanish carefully by myself. I have read novels and scientific works in Spanish. I have also traveled in Spain, and spoken with people there, and I am practically familiar with it.

(Testimony of F. W. Lynch.)

Q. Have you ever taken a Spanish course in any institution? A. No, sir.

Q. You never have? A. No, sir.

Q. Your knowledge of Spanish is gained primarily from the knowledge you learned on a sheep ranch in Southern California.

A. And from my mother, who was a good scholar in that language.

Q. Was your mother Spanish?

A. No, sir, she was a native of Ireland. [104]

Q. Where did your mother get her education in Spanish?

A. She was self-taught; also she taught in the public schools of San Francisco in the early days when many of the pupils were Spanish-speaking.

Q. Do you say that they taught Spanish as one of the regular course in the public schools at that time?

A. I did not say they taught Spanish. I said that many of the pupils spoke Spanish and it was necessary for the teachers to understand it.

Q. From what dictionary do you take the definition of these words you have just given us?

A. Seaome—Newman and Velasquez' Revision of the Spanish Dictionary.

Q. Have you consulted the Cortina Dictionary with reference to this? A. No, sir.

Q. Or Appleton?

A. Appleton's Dictionary is merely a revision by Valesquez. I have it at my home.

Q. Have you consulted it?

(Testimony of F. W. Lynch.)

A. Not recently, but I have seen the word "amapol."

Q. Did you consult the dictionary that is published by the Academy in Madrid, the Spanish Dictionary—I don't recall the name of it now?

A. No, sir, I have not.

Q. You are in the customs service?

A. Yes, sir.

Q. In the Government service? A. Yes, sir.

Q. How is the word spelled that you have just been defining?

A. A-m-a-p-o-l-a the accent is on the penult syllable, next to the last.

Q. Then you pronounce that "amapola"?

A. Yes, sir; that is the word.

Q. And the definition which you give of that is poppy? A. Poppy, yes.

Q. Does it mean a flower? Is it applied to any other sort of flower?

A. I believe not; I have never seen it applied to any other flower.

Q. Does the dictionary give the meaning of that as being applied to any other flower?

A. It gives, as I have said, the word "pappavia."
[105] I have never seen that word in any other place.

Q. Have you ever seen the plant?

A. I don't even know what it is. I could not tell you anything about it.

Q. Then you don't know that pappavia means poppy?

(Testimony of F. W. Lynch.)

A. On the authority of this dictionary, and also my study of Spanish—

Q. (Intg.) Have you the dictionary here?

A. It is an old edition. Appleton's is merely a revision of this.

Q. Find me the word in this dictionary. By the way, Mr. Lynch, do you know Mr. Aguirre, the Official Interpreter of the State courts? A. No, sir.

Q. You don't know him? A. No, sir.

Q. Do you know of him?

A. No, sir, I am not acquainted with him.

Q. And you don't know of him at all?

A. No, sir. I may possibly have seen his name, but I don't know of him. Here it is. Now, if you will turn to the other section and look for poppy, you will find it right there.

Q. This dictionary, by the way, is what is known as the English-Spanish dictionary, is it not?

A. And Spanish-English, yes.

Q. Is not this dictionary intended for a ready reference, *principal* for people using an interchangeable language? A. Yes, sir.

Q. For a ready, hasty reference? A. Yes.

Q. If you had any issue of importance would you accept this dictionary as being authority and being a complete and exhaustive work upon the definition, construction or use of any word or phrase in the Spanish language to be translated into English or anything in the English language to be translated into Spanish?

Mr. SELVAGE.—I wish you would limit that to

(Testimony of F. W. Lynch.)

the words that are in the dictionary and what the dictionary purports to give.

Mr. PRICE.—The witness, if your Honor please, has offered this as his authority. We believe we have a right to cross-examine [106] upon this authority to determine even from this witness' own statements as to how far he considers the reliability of the authority.

The COURT.—I think the suggestion made by counsel is proper; that it ought to be limited to such words as do appear.

Mr. PRICE.—My position is that there may be a great deal in the Spanish language and a great deal in the English language which does not appear in here and which would be evidence of the value of the book as an authority.

The COURT.—There may be a great many words in the Spanish language that do not appear in that dictionary, but with them we have no concern. The same as to words that are but little used. The question is, do the Spanish words that appear in there receive a proper English equivalent.

Mr. PRICE.—Q. Do the words which appear in here receive a proper, a thorough and an exhaustive equivalent of their use into the other language?

A. With regard to exhaustive of course they do not, because that is not the largest edition. But I have found that dictionary entirely reliable as far as it goes and I would consider the definitions there correct as far as they go. A more voluminous dictionary of course might have other definitions and

(Testimony of F. W. Lynch.)

other words, but so far as that goes I have found it entirely reliable. I have compared it with the latest edition.

Q. In other words, take the word "amagon," as we find it here, meaning dandelion, there is no other meaning given there; do you mean to say it is not possible that it has other meanings?

A. That is possible.

Mr. SELVAGE.—If your Honor please, I think the examination is going beyond reason, beyond the limits of the direct. He has a dictionary there that it would take hours and hours to select different words from it and cross-examine the witness about them. [107]

Mr. PRICE.—I am not going any farther than is necessary. I am not going through the dictionary.

Q. Amapola means poppy and papaver?

A. I don't ever know the correct pronunciation of papaver. I have never seen the word before or never noticed it.

Q. From your knowledge of the Spanish language, how should that word be pronounced.

A. Papaver.

Q. That is an English word? You don't know what that flower is?

A. There are technical terms which I do not know.

Q. Have you looked it up?

A. No; I have not taken the trouble to look it up.

Q. Do you know whether it appears in this dictionary or not?

The COURT.—There is a Standard dictionary in

(Testimony of F. W. Lynch.)

my chambers and you might refer to that.

Mr. PRICE.—Q. You have not consulted any dictionary to find the meaning of the word “amapola”?

A. No, I have not, but I have said already I have met the word before; I have seen the word in my reading. Also it is in that dictionary and also in Appleton’s.

Q. What reading have you seen it in?

A. I could not mention the whole list?

Q. Just general reading?

A. I have seen it in Don Quixote; I have seen it in Gil Blas; I have read twenty standard works.

Q. Have you met it just in general reading, or in some particular work?

A. No particular work; reading in newspapers, or novels, and so forth.

Testimony of Fred West, Recalled for the United States.

Mr. DANFORD.—Your Honor, this is the recalling of one of their witnesses.

Mr. SELVAGE.—We will ask him questions.

Mr. PRICE.—I think we are entitled to know for what purpose the witness is recalled. [108]

The COURT.—No, you are not entitled to know. You are entitled to object perhaps at the proper time.

Mr. SELVAGE.—Q. Mr. West, what is opium made from?

A. There is a classical definition of opium which most pharmacists have very firmly imprinted in their heads, and it reads the concrete milky exuda-

(Testimony of Fred West.)

tion obtained from incising the unripe capsules of "Papaver somniferum," family papaveraceae.

The COURT.—Q. What is the meaning of the word "somniferum" Mr. West?

A. The word is derived from "somnos" meaning sleep.

Mr. SELVAGE.—Q. In other words, opium is taken from the poppy plant?

A. It is the concrete milky exudation from the poppy plant.

Cross-examination.

Mr. PRICE.—Q. You state that opium is made from what plant? A. The papaver somniferum.

Q. That is the botanical name for poppy, is it?

A. It is the pharmaceutical botanical name for poppy; we have another poppy in California which has several names. I have the botanical name of that if you wish it.

Q. What is the botanical name for that?

A. That is called Eschscholtzia-California. It is named after a celebrated botanist Escholtz; I think his first name is Carl.

Q. The name you have given for poppy is the pharmaceutical name and not the botanical name?

A. The pharmacists depend upon the classification of the celebrated Botanist Linnaeus.

Q. Is it the pharmaceutical name or the botanical name as it is generally known? Let us get down to facts. We don't care what the answer is.

A. The botanical name is Popaver somniferum.

Q. That is the designation that is given in phar-

(Testimony of Fred West.)

macy? A. Yes, sir. [109]

Q. How many families have that same general name?

A. The "Papaveraceae. As far as my knowledge goes it includes the poppy family solely.

Q. And there are six different families. I will ask you to look at the word here in this dictionary (pointing to word in Funk & Wagner's Dictionary). Is that the word you refer to?

A. Papaveraceae. Of course if you use the genera and the species you would get an unlimited number.

Q. Is that the word you use? (Indicating.)

A. "Papaveraceae" is the name of the family of the poppy plant. The Latin definition for sleeping in interjected from somniferum the second word.

Q. Don't you find from this definition right here that it embraces 26 genera and 200 species?

A. Yes, that means that there are that many kind of poppies.

Testimony of Raphael Manzo, Recalled for the United States.

(F. W. LYNCH, acted as Interpreter).

Mr. SELVAGE.—Q. Mr. Manzo, you have testified that the bank that you are Manager of, is located in Mexico? A. Yes, sir.

Q. Has your bank done business continuously in Mexico for the last two years?

A. Yes, sir, much more time beyond that.

Q. Have you had occasion to move your bank to the American side during that period?

A. Since the beginning of the revolution we were

(Testimony of Raphael Manzo.)

obliged to change the business of the bank to the American side, to Nogales, in Arizona.

Q. Did you, when you changed your business to the American side, to Nogales, take with you all of the property of the bank?

A. The furniture we did not remove, but the money, the books and so forth we did. [110]

Q. Was there anything left in the bank except the furniture?

A. There were boxes left there with things inside.

Q. What boxes were left there with things inside?

A. I did not know what was in them.

Q. Were those the cases that you testified to when you were on the stand before, on yesterday?

A. The same.

Q. Why did you not move those with you to the American side?

A. Because the Chinese had told us that they contained opium and we knew that opium was contraband on the American side, and for that reason I did not take them.

Cross-examination.

Mr. PRICE.—Q. Was there anything else left in the bank? A. Nothing more.

Mr. PRICE.—(Addressing Mr. Lynch, the Interpreter.) Mr. Lynch, I wish you would repeat my questions to the witness exactly as I give them. If I am not mistaken your transaction of that question was, if there was anything besides the furniture and the books. My question was, was there anything else in there. I did not mention furniture.

(Testimony of Raphael Manzo.)

The INTERPRETER.—All right, sir. I will try and be literal. A. Nothing else.

Mr. PRICE.—Q. After they left your bank, do you know whether they went to the interior of Mexico, or not?

A. The boy to whom I gave them did not tell me anything about it.

Q. What is the name of that boy?

A. Jose Maria Tapia.

Q. Where is he now?

A. I don't know; he went away in the revolution.

Q. You have not seen him in Nogales recently, have you?

A. I have not seen him in Nogales.

Q. You do not know yourself what was in these boxes, do you?

A. I don't know personally, and I never saw what was in them. [111]

Q. You stated on your direct examination that the Chinaman told you what was in the boxes; were the defendants present when the Chinaman told you that? A. No.

Mr. PRICE.—If your Honor please, we will ask to have that stricken out as a statement not made in the presence of the defendant.

The COURT.—The motion will be denied. They were dealing with these boxes in the usual course of business and I understand they received them from Chinaman and were informed of their contents. The testimony was only to show why they did not remove the boxes at the time they removed the other

(Testimony of R. H. McCormick.)

property and valuables of the bank to the American side. Motion denied.

Mr. PRICE.—An exception.

Testimony of R. H. McCormick, for the Government.

R. H. McCORMICK, called for the United States, sworn.

Mr. SELVAGE.—Q. Where do you reside?

A. 1534 "K" Street.

Q. In this city? A. Yes, sir.

Q. What is your business or occupation?

A. Newspaper man.

Q. Have you been in that business continuously for the last year? A. Yes, sir.

Q. Have you at any time had anything to do with the hotel business? A. Yes, sir.

Q. What have you had to do with?

A. On the appointment of the superior court I was Receiver of the property known as the Hotel Porter, 91 Turk Street.

Q. While Receiver of the Hotel Porter, did you see either one of these defendants here? Mr. Poole or Mr. Murphy. A. Yes.

Q. Which one? A. Both.

Q. State whether either one of them stopped at the hotel.

A. Mr. Moore stopped at the hotel. [112]

Q. That is Mr. Poole. You knew him as Mr. Moore, did you?

A. The gentleman in the light clothes.

Q. Which one is he?

(Testimony of R. H. McCormick.)

A. The gentleman in the light clothes and with the glasses.

Q. Do you recall the room that he occupied?

A. 509.

Q. For how long a period did he occupy the room?

A. One month.

Q. Were you in the room during the time?

A. Yes, sir.

Q. State whether or not he had any trunk there.

A. He did.

Q. How many. A. Two.

Q. Could you identify the trunks?

A. I remember the general appearance of the trunks; I never saw them excepting closed, standing in the room.

Q. State whether or not you can identify any trunk here as being trunks that you saw.

A. The green tin trunk.

Q. You identify "U. S. Exhibit No. 6"?

A. A trunk to the best of my recollection in every and all respects similar to that trunk.

Q. Did you see him have any grips or suit-cases?

A. Not in the room.

Q. Did you see him have any at any place?

A. I have seen him carrying a grip.

Q. What was the character of the grip?

A. It was a dark grip.

Q. I will call your attention to a little black grip here and ask you if you have ever seen this before?

A. It is similar to the one that I saw Mr. Moore have.

(Testimony of R. H. McCormick.)

Q. Similar to the one you saw him carry?

A. Yes, sir.

Q. Describe the color; was it black, or what color was it?

A. I would not be positive it was black; it was a dark grip, similar to the one here. I could not say that was the grip. It is similar to the one I saw.

Q. Under what circumstances did you see him have that grip.

A. He came down in the elevator with it. [113]

Q. How often?

A. Not more than once to my recollection did I ever see him with a grip in his hand.

Q. Did you notice particularly at the time his handling of the grip, and if you did, what did you see about it?

A. I paid no particular attention to the grip as recalled by the question; he placed the grip on the floor in the office after coming down in the elevator; I think I was without the office and walked within at the time that I speak of; the grip was in his hand and he set it down, possibly to transact some business; I don't remember what he stopped at the office for.

Q. Did you notice anything about his movements to indicate whether it was heavy or light, or what condition it was in?

A. I did not pay any attention to that. I presumed from the way it was set down that it contained something; I presume at the time that it was wearing apparel, if the thought struck me at all; I

(Testimony of R. H. McCormick.)

do not know that it did.

Q. Do you recall testifying before the Grand Jury? A. Yes, sir.

Q. Do you recall—I will just ask you this in order to refresh your memory—whether or not you testified there that you noticed it was very heavy when he set it upon the floor?

A. Yes, I noticed that it contained something when he set it upon the floor.

Q. And that it had the appearance of being very heavy?

A. Yes, sir, that it would indicate that there was something in it, that it was not an empty grip.

Q. Where did he go with the grip after you saw that?

A. He returned to the elevator, which is an automatic elevator, and went to the first floor and out of the house,—went to the ground floor I should say out of the house, passes out of the main entrance of the building.

Q. Where is the office of the hotel?

A. On the second floor. [114]

Q. And he went to the first floor and out of the house? A. Yes, sir.

Q. Do you recall who was with him at that time?

A. He was alone.

Q. How often did you see the two defendants together there?

A. Mr. Murphy never stopped in the house, and the only time I ever saw Mr. Murphy would be when he was visiting in the rooms; I have seen them in the

(Testimony of R. H. McCormick.)

room once together, in the room in which they were visiting, not in Mr. Moore's room; I never saw them in Mr. Moore's room.

Q. Who else was in the room where they were visiting?

A. Miss Benier and there may have been some others.

The COURT.—Q. Did you state when this was?

A. I did not, you Honor.

Q. What time was it?

A. It would be in the month of July, 1913.

Cross-examination.

Mr. PRICE.—Q. The month of July?

A. Yes, sir.

Q. Do you remember what day he came there, about what time?

A. It would be about during the first week in July.

Q. What date was it you testified to seeing Mr. Poole go out with that grip?

A. I have no recollection; as to the date it would be sometime within the month that he was in the house.

Q. Do you know whether or not that was just shortly before he left?

A. I have no way of recalling the time because he visited the office several times, not frequently but possibly half a dozen times, during the time that he was in the house. It is to the best of my recollection that it would be sometime; I mean by that a week or two weeks after coming into the house as a guest.

Q. Well, as a matter of fact, was not the time that

(Testimony of R. H. McCormick.)

you saw him with this grip, just about the time that he was moving from your hotel to some other hotel?

A. I could not answer it any more definitely than I have. [115]

Q. Have you seen other people coming in and out of your hotel with grips similar to that?

A. I do not recall that during the 14 months I was there, that I ever saw a grip in the hotel of that character.

Q. Well, you know, do you not, that it is not an unusual thing for people to carry grips similar to that? A. Yes, I know that is not unusual.

Q. I don't doubt but what you have one like that yourself, haven't you—similar in some way?

A. No. I have a bag that shape, red leather.

Q. Now, the same as to this trunk, this trunk is only similar to the one you saw in that room; that is your evidence, is it?

A. Yes, the tin covered trunk with green tin.

Q. And a good many of the guests have trunks there? A. Most of them.

Q. Square trunks?

A. Mostly all square trunks, yes, sir.

Mr. SELVAGE.—Q. Did you see him register at the hotel? A. I did.

Q. Do you know where the register it?

A. No, sir. The litigation has been concluded and I turned the property over. I have not the register.

Mr. SELVAGE.—You may step down a minute. I am going to see if I can find that register in the office. I will put on another witness in the meantime.

Testimony of Dash Katona, for the Government.

DASH KATONA, called for the United States, sworn.

Mr. SELVAGE.—Q. Where do you reside?

A. Oakland.

Q. What is your occupation?

A. Clerk in a hotel.

Q. What hotel? A. Hotel Crellin.

Q. Do you know either of these defendants, Mr. Murphy or Mr. Poole?

A. Yes, sir, I recognize Mr. Murphy. [116]

Q. Did he ever stop at your hotel while you were there? A. Yes, sir.

Q. Under what name did he register?

A. A. J. Spencer.

Q. I will call your attention to the register of the hotel; about when was it he registered there?

A. In June, I believe, the last time.

Q. June of this year?

A. Yes, sir; I am not quite sure.

Q. Had he registered there prior to that time?

A. Yes, sir, twice I believe.

Q. Did he always register under the name of Spencer? A. Yes, sir.

Q. I will ask you whether or not these are the registers of that hotel? A. Yes.

Q. Will you kindly find the name under which he registered?

A. There is one, in 1912, in November.

(Testimony of Dash Katona.)

Q. Is that his own handwriting?

A. Yes, sir.

Q. I will ask you, the one in 1912 is found upon the register of the Hotel Crellin on November 18th; is it?

A. Yes, sir.

Q. Show me the name so that I can show it to the jury.

A. Here. (Indicating.)

Q. Is that his own handwriting?

A. Yes, sir.

Mr. PRICE.—We object to that, if your Honor please. It shows a date a long time prior to the date alleged in the indictment, and therefore is immaterial, irrelevant, incompetent, and without the issues of this case.

The COURT.—Objection overruled.

Mr. PRICE.—We note an exception.

Mr. SELVAGE.—Q. Now, in the other; just state where it is found—on what date?

A. Monday, February 17, 1913.

Q. And it is found on that page of the Hotel register?

A. Yes, sir.

Mr. PRICE.—We make the same objection to that, if your Honor please. [117]

Mr. SELVAGE.—And the other register?

A. June 20, 1913.

Q. Is that in his own handwriting?

A. Yes, sir.

Mr. SELVAGE.—I will ask to introduce these pages in evidence. I will pass them to the jury so they may examine the handwriting.

The COURT.—Mr. Price, your objection will be

(Testimony of Dash Katona.)

considered to have been made to the offer and over-ruled.

Mr. PRICE.—Yes, your Honor, the same objection and exception.

(The document was here marked “U. S. Exhibit No. 23.”)

Mr. SELVAGE.—And in connection with that I will call your attention, gentlemen of the jury, to the signature on the transportation ticket, and also the handwriting on the letter that has been introduced in evidence. I also call the jury’s attention at the same time to the signature on the sheet of the Lenox Hotel.

Q. State whether or not you ever saw these two defendants together at the hotel.

A. I don’t recognize the other party.

Mr. SELVAGE.—That is all.

Mr. PRICE.—No cross-examination.

Testimony of R. H. McCormick, Recalled for the Government.

Mr. SELVAGE.—Q. Mr. McCormick, I will call your attention to a hotel register and ask you whether or not that is the one that Mr. Poole signed?

A. It is.

Q. Where is his name?

A. The register is not paged, but it is under the date of Sunday, September 6th, 1913, and the first signature under that date. The room assignment is in my own figures.

Q. Is the signature in his own handwriting?

A. It was made in my presence.

(Testimony of R. H. McCormick.)

Q. And made by him? A. It was made by him.

The COURT.—Q. And the name is what?

A. George Moore.

Mr. SELVAGE.—I wish to call the jury's attention to the [118] signature.

Mr. PRICE.—The book has not been introduced in evidence as yet.

Mr. SELVAGE.—I will offer it in evidence at this time.

Mr. PRICE.—I am willing to stipulate that that book may be introduced in evidence.

(The book was here marked "U. S. Exhibit No. 24.")

Mr. SELVAGE.—I wish to call your attention at the same time to the receipt that was given for the boxes in Mexico, and to the letter that was written to Louis Sang by Olin on August 10th of this year.

Q. I will ask you if this defendant is the man who signed that book or that register—Mr. Moore?

A. Yes, sir.

Testimony of Maud Fay, for the Government.

MAUD FAY, called for the United States, sworn.

Mr. SELVAGE.—Q. What is your name?

A. Maud Fay.

Q. Where do you live? A. 440 Fourth Avenue.

Q. In this city? A. In the Richmond District.

Q. Do you know these defendants here?

A. I do.

Q. How long have you known them?

A. I know Mr. Moore since about the latter part of June.

(Testimony of Maud Fay.)

Q. And how long have you known Mr. Murphy?

A. A short time afterwards.

Q. Did you see them together?

A. Occasionally.

Q. Whereabouts?

A. Well, in a restaurant and on the street.

Q. Did you ever occupy any rooms near to the one Mr. Moore occupied? A. No.

Q. Were you ever at his room? A. I was.

Q. What hotel? A. The Porter.

Q. State whether or not he had any trunks or grips or suitcases there. A. He did.

Q. What trunks did he have? A. Two trunks.

Q. Would you recognize the trunks?

A. One of them I would; the [119] other one I am not sure of.

Q. Which one would you recognize, is there any here that you recognize? A. Yes.

Q. You may go and examine the trunk if you wish, or any of them?

A. This trunk is the only one I recognize.

Q. You recognize "Exhibit 6," do you, as being the trunk in his room? A. I do.

Q. I will ask you whether or not you recognize any grip that was in his room, or that he had?

A. Yes, that black one.

Q. This one (pointing)? A. Yes, sir.

Q. Where did he have this?

A. Well, it generally stood on his dressing-table.

Q. Did you ever examine it in his room?

A. No.

(Testimony of Maud Fay.)

Q. Did you ever see him have any suit-case or grip upon the street with him? A. No.

Q. Did you at the hotel, other than in the room?

A. No, I never saw him.

Mr. SELVAGE.—I wish to offer in evidence at this time this trunk, “Exhibit No. 6 for Identification,” and also the black grip which I hold in my hand, which this witness identifies as the grip she saw in his room.

Mr. PRICE.—I wish to cross-examine her before this is introduced in evidence.

The COURT.—Proceed.

Cross-examination.

Mr. PRICE.—Q. Miss Fay, how do you know this is the same trunk you saw in Mr. Poole’s room?

A. Well, of course, I could not swear it is, but the one in his room looked a great deal like that one.

Q. Then you won’t state under oath that this is the trunk you saw in Mr. Poole’s room, will you?

A. As far as I know I certainly would state that it was the trunk. [120]

Q. Well, do you know positively that this is the same trunk you saw there?

A. Of course, it is open now, but closed I could tell better.

Q. We will close it.

Mr. SELVAGE.—Just walk down and examine it if you wish.

A. Yes, sir, I am certain that is the trunk.

Q. Any mark on it by which you identify it?

A. No, there is no mark.

(Testimony of Maud Fay.)

Mr. PRICE.—Where is that other trunk, Mr. Selvage?

Mr. SELVAGE.—It has not been presented but we will have it brought in.

Mr. PRICE.—Q. Miss Fay, did you ever handle that grip? A. I did not.

Q. Your knowledge of that grip is based entirely on the fact that you have seen it in the room?

A. I saw it a great many times.

Q. Now, of those two trunks which one was it you saw in Mr. Poole's room?

A. I saw them both in Mr. Poole's room.

Q. Did he have two trunks there? A. He did.

Q. Did you not testify a moment ago you only saw one trunk in there?

A. I testified I saw two trunks in his room.

Q. What particular marks did you find on either one of these trunks that you identify?

A. I don't know of any marks. It is just the appearance of the trunks.

Q. Simply because they are square trunks and approximately of a certain size; is that it?

A. Yes, the trunks I saw were nearly twin trunks.

Q. Did you ever see anybody else have trunks very similar to those?

A. I never noticed them, no.

Q. As a matter of fact you would not have noticed these trunks had it not been you were coming here to testify in this case? Has not your mind been refreshed upon this? A. Not at all.

Q. Hasn't Mr. Wardell and Mr. Tidwell in-

(Testimony of Maud Fay.)

Q. Did you ever see him have any suit-case or grip upon the street with him? A. No.

Q. Did you at the hotel, other than in the room?

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(Testimony of Maud Fay.)

Mr. PRICE.—Where is that other trunk, Mr. Selvage?

Mr. SELVAGE.—It has not been presented but we will have it brought in.

Mr. PRICE.—Q. Miss Fay, did you ever handle that grip? A. I did not.

Q. Your knowledge of that grip is based entirely on the fact that you have seen it in the room?

A. I saw it a great many times.

Q. Now, of those two trunks which one was it you saw in Mr. Poole's room?

A. I saw them both in Mr. Poole's room.

Q. Did he have two trunks there? A. He did.

Q. Did you not testify a moment ago you only saw one trunk in there?

A. I testified I saw two trunks in his room.

Q. What particular marks did you find on either one of these trunks that you identify?

A. I don't know of any marks. It is just the appearance of the trunks.

Q. Simply because they are square trunks and approximately of a certain size; is that it?

A. Yes, the trunks I saw were nearly twin trunks.

Q. Did you ever see anybody else have trunks very similar to those?

A. I never noticed them, no.

Q. As a matter of fact you would not have noticed these trunks had it not been you were coming here to testify in this case? Has not your mind been refreshed upon this? A. Not at all.

Q. Hasn't Mr. Wardell and Mr. Tidwell in-

(Testimony of Maud Fay.)

structed you how to answer questions in this matter?

A. They have not. [121]

Q. Did they talk to you at all?

A. Not since before the Grand Jury investigation.

Q. Miss Fay, when you first came on the stand here, did you not testify you could identify one trunk but not both?

The COURT.—One of those that were there, she said.

A. I did not see this other trunk at all.

Mr. PRICE.—Q. Your answer was, it was one of those that was there?

A. It was one of those three; I identified that one over there.

Q. You say you have not talked to the officers at all since before you went to the Grand Jury?

A. Not more than to say how do you do.

Q. Prior to the time you went to the Grand Jury you talked with them, did you not?

A. Just one morning.

Q. Just one morning, and only one morning?

A. That is all.

Q. Whereabouts was that conversation?

A. At my home and at the Custom-house. Not with Mr. Tidwell and Mr. Wardell only at the Custom-house.

Q. Have you had any conversation with any other officers besides Mr. Wardell and Mr. Tidwell.

A. Mr. Smith.

Q. Has Mr. Smith instructed you how to answer the questions here? A. Not at all.

(Testimony of Maud Fay.)

Q. Miss Fay, sometime yesterday, in the witness-room of this court, in the presence of several of the witnesses who have been subpoenaed here in this case, did you not make the statement that the officers had told you exactly how to answer the questions?

Mr. SELVAGE.—To that I object unless it states the persons present that he calculates to call for impeachment, and the time and place where all this occurred.

Mr. PRICE.—In the presence of Miss Louise Lorraine and several other witnesses whose names I cannot now recall, did you not make that statement?

A. I did not. [122]

Q. Miss Fay, you say you never handled that valise, that grip? A. I never handled it, no.

Q. And you have just seen it in the room?

A. I saw it in the room frequently.

Q. Whereabouts in the room was it?

A. Generally on the dressing-table, as far as I can remember.

Q. Whereabouts was the dressing-table?

A. It was in one corner of the room; I cannot state just where.

Mr. PRICE.—That is all.

Mr. SELVAGE.—I now offer this trunk in evidence as being one of the trunks in the possession of the defendant Poole.

The trunk was here marked “U. S. Exhibit No. 26.”)

Testimony of G. R. Smalley, for the Government.

G. R. SMALLEY, called for the United States, sworn.

Mr. SELVAGE.—Q. Where do you reside?

A. San Francisco.

Q. What is your business or occupation?

A. Hotel clerk.

Q. Do you know the defendants here?

A. I know one of them.

Q. Which one.

A. Mr. Moore, the one with the glasses on.

Q. Where did you know him?

A. At the Hotel Alcazar.

Q. Are you one of those who was a clerk there at the time he was stopping at the hotel?

A. I was.

Q. How often did you see him?

A. Oh, about every day.

Q. Were you ever in his room. A. I was.

Q. Did you notice the furniture in his room and the paraphernalia he had himself?

A. Why, slightly, yes; never closely.

Q. How often did you see him going to and coming from his room?

A. Well, about every day; I could not say how many times a day.

Q. Was there any particular time of day he used to leave his room in the morning?

A. As a general rule not until around noon.

Q. Did he take anything with him or have any-

(Testimony of G. R. Smalley.)

thing with him when he [123] left the room at any time? A. Sometimes.

Q. What did he have?

A. Sometimes he had a black bag; I recollect once that he went out with a suit-case.

Q. How often did it occur that he went with a black bag; I mean approximately?

A. Well, I could not say approximately; it is pretty hard to state definitely how many times, there are so many people going in and out, but I have seen him going out several times with the black bag.

Q. For how long a period did he stop there?

A. I went to work there on the 31st of August and he went away on the 16th of September.

Q. Did you ever observe whether or not the grips or bags that he carried were heavy or light?

A. No, I could not say whether they were heavy or light.

Q. Could you tell by his appearance?

A. Well, he is a pretty strong man, he could carry a pretty heavy bag without showing it.

Mr. PRICE.—We ask that that go out, if your Honor please, as not responsive to the question.

The COURT.—Let it go out.

Mr. SELVAGE.—Q. Did you ever seen any indication that would tell you whether the bag was heavy or light? A. No, I cannot say that I have.

Q. Did you see Mr. Murphy there at all?

A. No, I have never seen Mr. Murphy that I know of until to-day, until this trial.

Mr. SELVAGE.—That is all.

(Testimony of G. R. Smalley.)

Mr. PRICE.—No cross-examination.

Mr. SELVAGE.—Q. I will ask you whether or not the bag was similar to the one that I show you here? A. Yes, sir.

Q. It was similar to that? A. Yes, sir.

Mr. PRICE.—Q. You have seen hundreds of similar bags, have you not? A. Possibly. [124]

Testimony of Louise Lorraine, for the Government.

LOUISE LORRAINE, called for the United States, sworn.

Mr. SELVAGE.—Q. Where do you reside?

A. At the Hotel Ray, in Oakland.

Q. Do you know the defendant, George Moore?

A. Yes, sir.

Q. Do you know him by any other name?

A. I do now.

Q. What other? A. George Poole.

Q. I will ask you whether or not he ever made you the present of a trunk?

A. Well, he was going to send me a trunk out he said, but—

Mr. PRICE.—Q. Just answer the question whether he did or did not?

A. He was going to give me a trunk, yes, sir.

Mr. SELVAGE.—Q. Did he give you the key to the trunk? A. Yes, sir.

Q. You say he was going to send it out to you?

A. Yes, sir.

Q. Where from?

A. I don't remember that he told me where from.

Q. Do you know whether the trunk was sent to

(Testimony of Louise Lorraine.)

you, or not? A. Well, I never received it, no, sir.

Q. What did you do with the key that was given to you?

A. I gave it to, I think it was Mr. Smith.

Q. Mr. Smith? A. Yes, sir.

Q. Would you recognize the key if you saw it?

A. No, sir, I would not.

Q. It was Customs Agent Smith you gave it to?

A. Yes, sir.

Mr. SELVAGE.—That is all.

Mr. PRICE.—No cross-examination.

Testimony of John W. Smith, for the Government.

JOHN W. SMITH, called for the United States, sworn.

Mr. SELVAGE.—Q. Mr. Smith, where do you reside? A. Oakland. [125]

Q. What is your business or occupation?

A. Customs agent.

Q. Do you know Louise Lorraine? A. Yes, sir.

Q. Do you know these defendants?

A. I do now.

Q. I will ask you whether or not you were ever given a key by Louise Lorraine? A. I was.

Q. Would you recognize the key?

A. Yes, sir, I have it here in my pocket (showing).

Mr. SELVAGE.—I now at this time offer in evidence the key just handed to me by Mr. Smith, the Customs Agent, and identified as the key that was given to Louise Lorraine by Mr. Poole, and then from Louise Lorraine to Mr. Smith.

Mr. PRICE.—No objection.

(Testimony of John W. Smith.)

(The key was here marked "U. S. Exhibit No. 27.")

Mr. SELVAGE.—I also demonstrate before the jury with that key that it is the key for this trunk, "U. S. Exhibit 26," and that it opens it.

Q. Did you ever see that trunk before?

A. Yes, sir.

Q. Where did you see it?

A. At the Alcazar Hotel.

Q. What did you do with it?

A. I opened it with the key that she gave me, and then took the trunk to the Customs-house.

Q. Where was the trunk at the time?

A. It was in the trunk-room in the Alcazar.

Q. Where was Louise Lorraine when she gave you that key? A. In her room.

Q. At the Alcazar? A. Yes, sir.

Q. Did you get any instructions as to what trunk it was?

A. Yes, I was told by the clerk that the trunk for room 21 was in the trunk-room, and the trunk was pointed out to me by the clerk.

Mr. PRICE.—We object to that, if your Honor please, as hearsay.

The COURT.—The objection is sustained. [126]

Mr. SELVAGE.—The only part I wish to remain in is that he was instructed where the trunk was, not what the clerk said to him.

Q. Mr. Smith, state whether or not you examined that trunk for the purpose of seeing what it contained. A. Yes, sir.

(Testimony of John W. Smith.)

Q. What did you find, if anything?

A. It was practically empty, but there was some little bit of opium scattered in the trunk, stuck on the sides of the trunk.

Mr. PRICE.—We object to that as the conclusion of the witness, your Honor please.

The COURT.—The objection is overruled.

Mr. SELVAGE.—Q. State whether or not you have had possession of a memorandum-book, a small red memorandum-book, or a black one, rather.

A. Yes, sir.

Q. Where did you get it?

A. I got it in the drawer of room 22, at the Alcazar Hotel, which was occupied by Mr. Poole.

Q. State whether or not there are any addresses in that book.

A. There is an address there of 30 Waverly Place; there is also another address, 112 East Washington Street, Stockton, which is the Foo Lung address, of which Louis Sang was the manager.

Mr. PRICE.—We object to that, your Honor. The witness is called to read an address from a book and he is now making a statement entirely aside from that. We ask that that go out.

Mr. SELVAGE.—I want to know who these people are, if he knows, and he has answered.

The COURT.—The motion will be denied.

Mr. SELVAGE.—Q. Where is 30 Waverly Place?

A. 30 Waverly Place is the place where Mr. Murphy was arrested, Wong Fat. It also has the telephone number of that place.

(Testimony of John W. Smith.)

Q. What is that telephone number?

A. It is "China 1386."

Q. Do you know whose handwriting that is written in—that book?

A. I cannot vouch for that. [127]

Q. Did you find any other memoranda?

A. We found some other letters. Mr. Stone has possession of them, that we got together.

Mr. SELVAGE.—At this time I will offer this book in evidence.

(The book was here marked "U. S. Exhibit No. 28.")

The WITNESS.—The name Foo Lung is in there; it is spelled backwards.

Q. I wish you would call the attention of the jury to how that name is spelled, and where it is.

A. O-O-F-G-N-U-L, 112 East Washington Street.

Q. Is that that Chinese address?

A. It is Foo Lung's address in Stockton. Here is another memorandum, 80 at 21.50 each, 1700. There are also a number of figures in different places here.

Cross-examination.

Mr. PRICE.—Q. Mr. Smith, did you attempt to unlock this trunk with any other key?

A. No—yes, I did, with several keys before I got the key to it.

Q. Did you attempt to unlock any other trunk with that key?

A. I never tried. It is a very difficult lock though to unlock.

(Testimony of John W. Smith.)

Q. What is there particularly peculiar about this trunk lock?

A. If I remember right, I think it is a Yale lock.

Q. Come down now and show me what is particularly peculiar about this lock?

A. Well, where lots of trunks can be opened with ordinary keys, it is not easy to open this trunk.

Q. Is not that an ordinary trunk-key?

A. It is for that kind of a lock.

Q. Don't you call that an ordinary trunk-key?

A. No.

Q. If this key was handed to you on a bunch of keys, could you pick that out as an extraordinary trunk-key? A. No, I could not.

Q. What is there extraordinary about that trunk lock? A. I think that is a Yale lock. [128]

Q. You think it is a Yale lock?

A. I think that I had a number of keys—it says “Yale & Towne” on it. Yale & Towne locks are not easy to unlock. I have a number of trunk-keys, but I have none of them that will unlock a Yale & Towne lock.

Q. Do you know that there are other keys that will unlock them?

A. I do not. I know that these locks are difficult to unlock.

Q. But you don't know that there are other keys that will unlock them? A. No, I do not.

Q. Don't you also know, Mr. Smith, that if you lose a trunk-key it is very easy to go to a trunk-store and get it replaced; you know that, don't you?

(Testimony of John W. Smith.)

A. You can do that with any lock.

Q. Then your contention is that this particular sort of a lock a key made for that lock will not unlock any other, and a key made for another lock will not unlock that? A. I would not say that.

Q. Now, come down here just one moment more: I ask you to examine that lower trunk; is it locked or unlocked? A. I know it is not locked.

Q. Just examine it, Mr. Smith, just for a moment; is that locked now or unlocked.

The COURT.—This man did not present himself as a lock expert; he has simply identified a key.

Mr. PRICE.—He identified a key, and he has said that this key was for this particular trunk.

Q. Don't you notice, Mr. Smith, that they key also unlocks the lower, trunk? A. Yes, sir, it does.

Q. There may be other Yale & Towne locks made in duplicate. A. I am no lock expert.

Q. Mr. Smith, have you interviewed any of the witnesses in this case?

A. Have I interviewed any of the witnesses?
[129]

Q. Yes, have you talked with them outside the courtroom? A. Oh, yes; I remember that.

Q. Can you state whether you have, or have not?

A. Whether I have talked with any of the witnesses? Yes, probably I have.

Q. With a view of influencing the testimony they were to give here? A. No.

Mr. DANFORD.—For the purpose of impeachment, your Honor, may I lay a foundation?

(Testimony of John W. Smith.)

The COURT.—Yes.

Mr. DANFORD.—Q. Mr. Smith, did you not speak to Mr. Sananes, a Spanish gentleman, in the Glen Hotel in this city, in room 412, on or about September 23, 1913, with only yourself, Sananes and a friend of yours who came with you to that place, did you not say substantially this while speaking of the defendants Murphy and Poole to Sananes: “You know these men have been handling opium and you can so testify”; and did he not say, “If I so testified it would be a lie”; and did you not then say, “Oh, you can so testify anyhow; they don’t care for you; they call you a Greaser”; and didn’t he reply, “I could not say that what you want me to say, and if they call me that they are bad boys, I am a Spaniard and not a Mexican.” Did not that conversation take place between you at that time?

A. Not to my recollection.

Q. Would you swear that it did not?

A. I think I can swear that it did not.

Testimony of John T. Stone, for the Government.

JOHN T. STONE, called for the United States, sworn:

Mr. SELVAGE.—Q. Mr. Stone, where do you reside? A. San Francisco.

Q. What official position do you hold with the Government? [130]

A. Special Deputy Surveyor of Customs.

Q. How long have you been in the employ of the United States? A. 15 years.

Q. Do you know these defendants? A. I do.

(Testimony of John T. Stone.)

Q. How long have you known the defendants?

A. Since about the 17th of September.

Q. State whether or not you were ever at the room that was occupied by Mr. Poole prior to his arrest.

A. I was.

Q. Did you find anything there? A. I did.

Q. What?

A. I found a telegram dated August 22d, at El Paso, and a letter dated the 2d of September.

Q. Have you those papers? A. I have.

Q. What room was it you found them in?

A. Room 222, Alcazar Hotel.

Q. Have you seen the handwriting of Mr. Murphy on hotel registers at other places? A. I have.

Q. State whether or not you identify the handwriting of this letter.

A. That is the handwriting of Mr. Murphy, to the best of my knowledge.

Q. Is it similar in every way? A. It is.

Q. Did you find anything else in that room?

A. Those are the only two pieces of correspondence that I found.

Q. This is the letter, is it, that you recognize as his handwriting? A. That is the letter, yes, sir.

Mr. SELVAGE.—I will now offer this letter in evidence. It reads as follows (reading).

(The letter was here marked "U. S. Exhibit No. 29.)

Q. This is the condition in which you found it?

A. That is the condition in which we found it.

Mr. SELVAGE.—I will call it to the attention of

(Testimony of John T. Stone.)

the jury so that they can see it and they can compare the handwriting with the others. They have seen the writing so often now that I think they [131] will be able to recognize it. This telegram reads as follows: (Reads.) (The telegram was here marked "U. S. Exhibit No. 30.")

Q. That is all you found in the room?

A. That is all.

Mr. PRICE.—No cross-examination.

Testimony of William Roberts, for the Government.

WILLIAM ROBERTS, called for the United States, sworn.

Mr. SELVAGE.—Q. Where do you reside?

A. 1338 Stevenson Street.

Q. What is your business? A. Blacksmith.

Q. Have you any other business in connection with your blacksmithing business?

A. Yes, sir, a stable business.

Q. Have you a room there where you accept and receive trunks, and such things?

A. Not as a custom, no, but I have plenty of room in the place, yes, sir.

Q. State whether or not you know these defendants?

A. I am acquainted with Mr. Murphy, slightly.

Q. Have you ever seen Mr. Moore? A. No, sir.

Q. With whom did you see Mr. Murphy?

A. A man by the name of Benton.

Q. Where does Benton reside?

A. I am not sure of the number, but it is on Stevenson Street.

(Testimony of William Roberts.)

Q. How far is it from your place of business?

A. About half a block.

Q. Do you recall this defendant, Mr. Murphy, leaving any trunks with you? A. No, sir.

Q. Did you ever receive any trunks belonging to him? A. No, sir, not that I know of.

Q. I should have said Mr. Benton. A. Oh, yes.

Q. Was Mr. Murphy with him? A. No, sir.

Q. You say you had trunks left with you belonging to Benton? A. Yes, sir. [132]

Q. State whether or not any of the trunks that are here were the trunks that were left with you?

A. Yes, sir, these two, I can identify them.

A. (Contg.) These two are so much alike, but I guess they are the trunks.

Q. You recognize the two, No. 4 and No. 5?

A. Yes, sir.

Q. And numbers 6 and 26 look like the trunks that you had? A. Yes, sir.

Q. What was done with them?

A. Well, on the day that they came in there, about 3 o'clock, Officer Head came into my place and opened them up.

Q. How long after they had been brought there to you? A. About 3 or 4 hours.

Q. Who brought the trunks in?

A. A man who is working for me, Mr. Baker.

Q. What is his name? A. Martin Baker.

Q. Who is the one who first spoke to you about taking these trunks to keep them? A. Mr. Benton.

Q. You were pretty well acquainted with Mr. Benton, were you?

(Testimony of William Roberts.)

A. Well, slightly; I have seen the man several times in two years.

Q. Do you know anything about how these trunks were moved?

A. The man who is working for me could give you better information about that.

Q. Do you know anything about a trunk going to the Alcazar? A. Only from what he said.

Cross-examination.

Mr. DANFORD.—Q. So far as you know, Mr. Benton is the man from whom these trunks you identify came? A. Yes, sir.

Q. And so far as you know Mr. Murphy had no knowledge of the trunks and had nothing to do with them? A. Not so far as I know, no, sir. [133]

Q. How often did you see Benton?

A. Well, possibly once or twice a week.

Q. Did you see him with Murphy more than once?

A. Yes, sir.

Q. How many times?

A. Well, I could not say; possibly 8 or 10 times, in the neighborhood, several times.

Q. Did you see anything unusual about those two young men being together, or were they young men—is Benton a young man?

A. Well, I guess about middle aged, 36 or 37 years of age.

Q. You did not see anything unusual about them?

A. No, sir.

Q. Nothing that attracted your attention as being usual? A. No, sir.

Testimony of Martin Baker, for the Government.

MARTIN BAKER, called for the United States, sworn.

Mr. SELVAGE.—Q. Mr. Baker, where do you reside? A. 1338 Stevenson Street, San Francisco.

Q. Do you know either of these defendants here?

A. I know one of them.

Q. Which one? A. The one to the left.

Q. Mr. Murphy? A. Yes, sir.

Q. How long have you known him?

A. About four months, I believe, or somewhere along there.

Q. Where did you know him?

A. I just seen him up on Stevenson Street and Duboce Avenue.

Q. With whom did you see him?

A. Charlie Benton.

Q. He is one of the defendants in this case—Benton. A. Charlie Benton.

Q. He is one of the defendants in this case—he is the same man? A. That is the man.

Q. Did you ever move any trunks for him?

A. For Benton?

Q. Yes. A. Yes, sir.

Q. Where did you get the trunks?

A. I got two up on Stevenson, [134] 1346a Stevenson Street, and I got two down at the Hotel Thames.

Q. What two did you get? I will ask you if you recognize any of these trunks here.

A. Yes, sir, that long one there.

(Testimony of Martin Baker.)

Q. Any others? A. And that one over there.

Q. Numbers 4 and 5?

A. I got them down at the Hotel Thames.

Q. You got those at the Hotel Thames?

A. Yes, sir.

Q. Now, do you recognize the other trunks?

A. Yes, sir.

Q. Where did you get those?

A. 1346 Stevenson Street.

Q. Are those the ones you got at Benton's place?

A. Yes, sir.

Q. Who told you where to take these trunks?

A. Charlie Benton.

Q. Where did he tell you to take them?

A. He told me to take one over to the store at 61 Duboce and the other one to take up to the Alcazar Hotel.

Q. Did you take the trunk to the Alcazar Hotel?

A. Yes, sir.

Q. What trunks did you store at 61 Duboce?

A. The top one.

Q. You stored it. Where did you store it?

A. 61 Duboce.

Q. Any other?

A. I took the other one to the Alcazar Hotel, the one down below.

Q. The bottom one you took to the Alcazar Hotel?

A. Yes, sir. I stored those two at 61 Duboce.

Q. How do you recognize the difference between those trunks?

A. One was a little larger than the other one.

(Testimony of Martin Baker.)

Q. What was done with the other two trunks?

A. I took them from the Thames Hotel and took and stored them up at 61 Duboce.

Q. I understand you stored three of those trunks at 61 Duboce Street and left the fourth one at the Alcazar Hotel? A. Yes, sir.

Q. Which one did you take to the Alcazar Hotel? The large one or the smaller one?

A. The smaller one of the two on that side. (Pointing.) [135]

Cross-examination.

Mr. DANFORD.—Q. All of the transactions and all of the business you had with these trunks was for the defendant Benton? A. Yes, sir.

Redirect Examination.

Mr. SELVAGE.—Q. From whom did you get those two trunks that you got at the Thames Hotel?

A. Benton was there himself and helped me down with them. I got them from him.

Q. Was there any other person there?

A. There was a lady there running the elevator; that is all I seen.

Q. When you got the other trunks from Mr. Benton's place, who was there?

A. There was a lady there.

Mr. DANFORD.—Q. Do you know where this man Benton is? A. No, sir.

Mr. SELVAGE.—Q. Who were you to deliver the trunk to at the Alcazar? A. To Mr. Moore.

Q. Mr. Moore.

Q. Mr. Moore? A. That is the name that I got.

(Testimony of Martin Baker.)

Q. When you went to the Alcazar, did you find Mr. Moore? A. No, sir.

Q. Why?

A. The clerk told me that he was asleep and he would not let me wake him up.

Testimony of P. O. Huffaker, for the Government.

P. O. HUFFAKER, called for the United States, sworn.

Mr. SELVAGE.—Q. Where do you reside?

A. In Oakland.

Q. Are you in the employ of the United States Government? A. Yes, sir.

Q. State whether or not you know the defendant Poole. A. I do.

Q. Had you any occasion to follow him after he reached this city? A. Yes, sir. [136]

Q. When was it? A. That was on October 5th.

Q. On the 5th of October last? A. Yes, sir.

Q. Where did you follow him from and to where?

A. Do you mean every place that he went, or just a general idea?

Q. Just a general idea.

A. He went up to a few places around the Hotel Kern and then went out to a place on Stevenson Street.

Q. Who went with him to Stevenson Street?

A. Miss Lorraine.

Q. To what place did they go on Stevenson Street?

A. They went to a place in about the middle of the block, a big apartment house there, 1346a Stevenson

(Testimony of P. O. Huffaker.)

Street, as near as I could tell.

Q. Do you know who lives there?

A. I have been told that—

Mr. PRICE.—We object to what the witness has been told.

Mr. SELVAGE.—Q. Did you make any inquiry there? A. No, I made no inquiry.

Mr. SELVAGE.—That is all.

Mr. PRICE.—No cross-examination.

Mr. SELVAGE.—That is our case.

(A recess was here taken until 2 P. M.)

AFTERNOON SESSION.

Mr. SELVAGE.—May it please the Court: I now move to admit the different matters in evidence here that have been marked for the purpose of identification—some of them have gone in, but the exhibits have been marked from 1 to 30.

The COURT.—Do you know which are in evidence and which have been marked for identification?

The CLERK.—I can call off a list. The first is a deposit slip with some writing on it; the keys; a package of papers and a [137] small memorandum-book for identification; a long trunk for identification; and another trunk, No. 5; the labels; deposit slips, with writing thereon; a yellow tag; a card; a card; a card; a Chinese book; page of hotel register, and that also introduced as an exhibit; baggage-check No. 7282; a second baggage-check of the same number; a letter dated El Paso, Texas, May 19th which was introduced in evidence as an exhibit. All the rest were marked for identification.

(Testimony of P. O. Huffaker.)

Mr. PRICE.—We object to anything being admitted in evidence not connected with the defendants and not connected with the *corpus delicti* in this case.

The COURT.—The objection is overruled.

Mr. PRICE.—We note an exception.

Mr. SELVAGE.—That is our case.

Mr. PRICE.—If your Honor please, at this time we desire to interpose a motion in this case and will ask your Honor that the jury be excused while the motion is interposed and argued.

The COURT.—The motion will not be argued; you may make the motion.

Mr. PRICE.—We make a motion that your Honor instruct this jury. I understand your Honor's ruling is that you will not exclude the jury while this motion is being made.

The COURT.—No.

Mr. PRICE.—We move your Honor at this time that your Honor instruct the jury to acquit these defendants for the reason that the prosecution has not established a *prima facie* case. We are prepared to argue that motion.

The COURT.—The motion will not be argued; it will be denied.

Mr. PRICE.—We note an exception.

Testimony of Louie Sang, for the Defendants.

LOUIE SANG, called for the defendant, sworn.

(Dr. GARDNER acted as Interpreter.) [138]

Mr. PRICE.—Q. Do you remember testifying here yesterday? A. I do.

Q. Do you remember testifying to sending \$300 to

(Testimony of Louie Sang.)

Mr. Poole at El Paso? A. I do.

Q. Did you receive any opium in return for that \$300?

A. \$300 formed the last payment; when George was here he said, "I have got some opium over on the other side that I can let you have, you let me have \$300 and I will let you have 12 cans." When he went back he telegraphed me and I sent him the money.

Q. Did you get the opium—did you get any opium from him?

A. Then afterwards I saw no trace of either him or the opium and he still has my money for the opium.

Q. And you never got the opium?

A. Not the last time.

Q. When did you ever buy any opium from Mr. Poole—the last time?

A. February of this year when George came with a friend and saw me at Stockton; on that occasion I bought the last amount of opium from him.

Q. Is that the last time that you bought any opium from him?

A. That was the last time, and then I sent him the money in March.

Q. Did you buy that from Mr. Poole, or did you buy it from a friend of his, someone else?

A. I don't know whether he or his friend owned the opium, but my transaction was with him.

Q. Now, Louie Sang, didn't you state to me in the corridor of this courtroom, at about half-past one

(Testimony of Louie Sang.)

o'clock to-day, in the presence of Mr. Sananes, that the last time you bought any opium from Mr. Poole was in 1909 when you were Manager of the Lee Yung Chung Company?

A. You did not understand me right. I thought you asked me, since what time I became with him, and I said my first acquaintance with him was over opium transactions, and that was about 1909.

Q. I would like to put one question direct to the witness Louie Sang, you speak English, don't you?

A. (Through the Interpreter.) [139] I do speak some English, but I am afraid if I speak English altogether I might make a mistake.

Q. Let us try it and see how you get along with English. Now, Louie Sang, out in the corridor of this courtroom to-day did I not ask you this question: "When is the last time you bought any opium from Mr. Poole," and didn't you say "1909"? Do you remember counting on your fingers? Answer in English now, please.

The INTERPRETER.—He says, "I would rather have that explained to me in Chinese.

Q. Louie Sang, didn't you talk English with me this afternoon? Answer in English.

A. (Through the Interpreter.)—What I mean to convey to you at that time was that 1909 was also the last time that he and I were together and exchanged opium.

Q. That was the last time you were together and exchanged opium. Louie Sang, did I talk to you in English to-day?

(Testimony of Louie Sang.)

A. (Through the Interpreter.) Yes, sir.

Q. And didn't you talk to me in English?

A. Yes, sir.

Q. Why don't you do it now?

A. When I talk in the presence of many people I might get confused speaking in English.

Q. Did you ever buy any opium from Mr. Murphy? A. No.

Mr. PRICE.—Take the witness.

Mr. SELVAGE.—That is all.

Testimony of B. M. Sananes, for the Defendants.

B. M. SANANES, called for the defendants, sworn.

Mr. DANFORD.—Q. Did you hear a conversation between Louie Sang, when you were present, and together with Mr. Price in the corridor of this building at about 1:30 to-day, and if you did, did this conversation take place; "Mr. Price to Louie Sang: When was the last time you bought opium?"—

Mr. McKINLEY.—One moment, if your Honor please. We object [140] to the form of this question.

Mr. SELVAGE.—This is an effort to impeach his own witness.

Mr. DANFORD.—We will show that he made those statements, if your Honor please, in the corridor, at 1:30 to-day. That is the reason he was called and put on the stand. We only want the facts to come before the jury. We want to show that he made those statements.

The COURT.—The rule is that if you put a witness on the stand you cannot impeach him.

(Testimony of B. M. Sananes.)

Mr. DANFORD.—This Chinese witness took the stand and gave testimony that required us recalling him and before recalling him *and before recalling him* to the stand we talked to him and he then made declarations which proved on the witness-stand as a witness for the defendant to be a surprise to us.

The COURT.—You may be permitted to go this far: to explain the reason why the witness was put on the stand by you, you may elicit from the witness the statements made by the witness Louie Sang to you in the corridor or wherever they were made, but the jury must understand that they cannot take as true the declarations which you may prove that the witness made in the corridor.

Mr. DANFORD.—Independent of other circumstances—is that the idea of the Court?

The COURT.—Yes.

Mr. DANFORD.—Yes, your Honor, that is our understanding.

The COURT.—That is to say, you cannot introduce before the jury through this witness declarations of Louie Sang in the corridor for the purpose of the jury taking the statement made by him there as true. That is all; but only to show that you were surprised when you put him on the stand.

Mr. McKINLEY.—If your Honor please, I have one further objection to the form of the question put by counsel—it was not [141] quite completed, but the form of it will show what the intent is. I object to it upon the ground that the question is leading inasmuch as counsel was proceeding to give

(Testimony of B. M. Sananes.)

the words which he wished the witness to confirm or deny had been used in that conversation.

The COURT.—Yes, I think you had better ask the witness to state what he heard the witness Louie Sang state.

Mr. DANFORD.—Q. You have heard a conversation, at about 1:30, in the corridor of this court, between Louie Sang and Attorney Price, and in your presence? A. Yes, sir.

Q. Will you please tell the Court and the jury what that conversation was?

A. Mr. Price asked this Chinaman how long since Mr. Moore—how long since he bought opium from Mr. Moore: He said, “Long, long time ago.” He said, “How long ago?” He said, “Oh, long, long time ago”—he said two or three times, “Long, long time.” He said, “How long a time? Tell it in Chinese.” He repeated two or three times, “Long, long time ago”; afterwards he said 1909; Mr. Price told him to write it on a piece of paper, he told him to write it on some paper.

Q. Did he write it?

A. I believe he did; I didn’t pay attention to that.

Q. Did he say how many years, or when?

A. 1909.

Q. That is all on that matter. I will ask you now, where did you room or where did you live on or about September 23, 1913? A. The Glen Hotel.

Q. What room?

A. Room 412—no, I believe I had 312 then; I changed.

(Testimony of B. M. Sananes.)

Q. Did you meet, on or about the 23d of September, 1913, this Mr. Smith who just arose in the courtroom here, in that room?

A. Yes, sir, there were two gentlemen came to see me there.

Q. Is he one of them?

A. He is one of them, yes, sir.

Q. And there was another gentleman who came with him? A. Yes, sir.

Q. Now, at that time and at that place, did Mr. Smith say to you— [142]

Mr. McKINLEY.—We object. I make the same objection to the form of this question as I did to the last.

The COURT.—This is an impeaching question.

Mr. McKINLEY.—And I want to make the further objection at this time upon the ground that it is an attempt to impeach a witness on a collateral matter brought out on cross-examination and by which counsel is bound.

The COURT.—No, it is not a collateral matter; it is a declaration tending to show the interest of the witness.

Mr. McKINLEY.—Oh, if that is the idea we will not make any objection.

Mr. DANFORD.—Q. When you and he were present, in the City and County of San Francisco, State of California, at the Glen Hotel, in your room 412, on the 23d of September, 1913, did he say to you, "Sananes, you know these men have been handling opium and you can so testify," and did you not say,

(Testimony of B. M. Sananes.)

“If I so testified it would be a lie”; and did he not then say, “Oh, you can so testify anyhow; they don’t care for you; they call you a Greaser,” and did you not reply, “I could not say what you want me to say, and if they call me that they are bad boys. I am a Spaniard and not a Mexican”—is not that substantially what took place in conversation between you and them? A. About that.

Cross-examination.

Mr. SELVAGE.—Q. Where do you reside?

A. At the present time?

Q. Yes. A. At the Glen Hotel.

Q. How long have you been living there?

A. Pretty near two and a half months or three months.

Q. What is your occupation?

A. At the present time I am a cigar drummer.

Q. How long have you been a cigar drummer? [143]

A. This time I have been for the last seven months, but I was eight years before that.

Q. In the meantime, from the time you were a cigar drummer in the first instance until the present occupation as a cigar drummer what were you doing?

A. I was manager of the bull-ring at Juarez, Mexico.

Q. Manager of the bull-ring?

A. Yes, and assistant manager.

Q. Are you doing business with these men?

A. No, sir.

(Testimony of B. M. Sananes.)

Q. How did you get acquainted with them?

A. I knew them in El Paso; in El Paso and Juarez.

Q. How long did you know them there?

A. I know them for a while, I can't tell exactly; I just seen them around there; I didn't talk very much to them.

Q. You said that that was about what Smith said to you; did he ask you to tell a falsehood?

A. A falsehood?

Q. Yes. A. No.

Q. He did not ask you to tell a falsehood?

A. I do not know what you call a falsehood.

Q. A lie; did he ask you to tell a lie?

A. I don't know; I can tell you what he asked me.

Q. What was it he asked you?

A. He asked me if I know these people and I tell him yes; and he said, "What are you doing?" and I said I was manager of the bull-ring there. He said, "You know they are handling opium?" I said, "I don't know." He said, "You can testify to it." Both of them were asking questions. He said, "Could you testify against them, and that you know they are handling opium?" I said, "No, if I do I would be lying about it." They said, "Well, they are not your friends; they call you a Greaser." I said, "If they call me a Greaser they are bad; I am not a Greaser; I was born in Spain." They asked me if I knew a gentleman by the name of Dick Smith. I said, "Yes, I know he had a saloon there, and I had some [144] business with him in the bull-ring because we rented him the bull-ring for a prize-fight.

(Testimony of B. M. Sananes.)

He asked me if he was here in town. I said, "I don't know." He said, "If he comes around will you let me know?" and he gave me his card, and told me to call him up if I heard of Dick Smith.

Q. And that was what conversation you had with Smith?

A. Well, maybe I had a few words more.

Redirect Examination.

Mr. DANFORD.—Q. What has been the extent of your education in Spain, how many years?

Mr. SELVAGE.—I object to that as immaterial.

Mr. DANFORD.—It is on the subject matter of the term "Amapol."

Mr. SELVAGE.—All right, I will withdraw my objection.

Mr. DANFORD.—Q. How many years' education did you have in Spain? A. About 8 or 9 years.

Q. Are you what you would call well educated in the Spanish language?

A. I believe I am fairly educated.

Q. You are thoroughly familiar with the Spanish language? A. Yes, sir.

Q. What is meant by the term "Amapol" in Spanish?

A. That word don't exist in Spanish; it is not a word in Spanish.

Q. What is meant by the term "Amapola"?

A. That is a flower.

Q. What kind of a flower?

A. In English it is a corn-flower.

Q. Has it any reference at all from the standpoint

(Testimony of B. M. Sananes.)

of Spanish language to opium, in Spanish?

A. If it does I don't know it. I never studied that.

Q. How do you pronounce "opium" in Spanish?

A. "Opio."

Recross-examination.

Mr. SELVAGE.—Q. Does Amapola in Spanish mean poppy?

A. I don't know what poppy means.

Q. You don't know what poppy means?

A. No. [145]

Mr. DANFORD.—He does not know what it means in English?

A. I am not very well acquainted with English.

Q. You don't know what the poppy plant is?

A. No.

Q. You don't know what the poppy flower is?

A. No. Maybe I know it, but in English I don't know what it means.

Q. What dictionary did you get that from?

A. What dictionary,—what do you mean?

Q. What dictionary did you get the definition of "Amapola" from?

A. I didn't get it from any dictionary; I know it.

Q. Do you get any of your language from the dictionary? A. Yes.

Q. Do you understand what I mean?

A. No, sir.

Q. Do you consult a dictionary when you want to learn what a word means in Spanish? A. Yes.

Q. Have you consulted any dictionary to find out

(Testimony of B. M. Sananes.)

what the word "Amapola" means?

A. No, sir, I know it.

Q. How do you know it?

A. Because I know what "Amapola" is. It is a very common word in Spanish; it is a flower.

Q. And if the Spanish dictionary says it means poppy, then the dictionary is wrong?

A. I don't know; I never seen the dictionary in English and Spanish. In the Spanish dictionary they do not say what the word means in English. In Spanish the word don't exist. I don't know what it is in English.

Testimony of Arthur Heatherly, for Defendants.

ARTHUR HEATHERLY, called for the defendants, sworn.

Mr. DANFORD.—Q. What is your name?

A. Arthur Heatherly.

Q. Where do you live? A. Oakland.

Q. What is your business?

A. Clerk of the Hotel Ray.

Q. Are you acquainted with the Chinese known as Louie Sang? A. Yes, sir.

Q. Are you acquainted with this defendant here, Mr. Poole? A. Yes, sir.

Q. And have you seen this distinguished gentleman before? A. Yes, sir. [146]

The COURT.—Which distinguished gentleman?

Mr. DANFORD.—I was pointing to counsel, your Honor.

Q. Did you hear a conversation last night between Louie Sang, the Chinese, and this defendant Poole?

(Testimony of Arthur Heatherly.)

A. Yes, sir.

Q. Was that whole conversation in the English language? A. Yes, sir.

Q. Will you please tell the Court and the jury what it consisted of?

A. Mr. Poole asked the Chinaman when he last bought opium; the Chinaman said in 1909; and Mr. Poole asked him what month, and he said in November or December, he did not remember just which. I think that is all that was said about buying opium. Something was said about sending for opium again but he did not get it—later.

Q. But Poole did ask him in your presence when last Sang did buy opium from him Poole, and he did answer in November or December, 1909?

A. Yes, sir.

Q. And that was all in the English language?

A. In the English language.

Q. Did you have any difficulty in understanding the Chinese? A. No, sir, I did not.

Q. He spoke fluently?

A. Well, he spoke plainly, so you could understand him.

Cross-examination.

Mr. SELVAGE.—Q. What did you say your name was? A. Arthur Heatherly.

Q. What is your business?

A. Clerk of the Hotel Ray.

Q. How long have you been there?

A. Three months.

Q. Are you acquainted with these defendants?

(Testimony of Arthur Heatherly.)

A. Yes, sir.

Q. Where did you become acquainted with them?

A. I knew Mr. Poole in El Paso.

Q. How long ago did you know him in El Paso?

A. I expect 17 or 18 years ago; something like that, I am not sure. [147]

Q. Did you continue your acquaintance with him until the present time?

A. I have not seen George much in the last 10 or 11 years until he came out here.

Q. You have not seen him much; you have seen him here though since he came? A. Yes, sir.

Q. How long have you been here?

A. I have been in California nearly two years.

Q. How often have you seen Poole in that time?

A. A great many times.

Q. Where were you located?

A. I was working in San Francisco part of the time.

Q. What place,—what were you doing?

A. I was working for the Blum Advertising Company.

Q. What relations had you with him during that time? A. Nothing only a friend.

Q. Nothing but friendly? A. Yes, sir.

Q. Where did you meet him?

A. Met on the street, and sometimes around cigar-stores, and sometimes in saloons.

Q. Did you and he live at the same place?

A. No, sir.

Q. Did you know what business he was in?

(Testimony of Arthur Heatherly.)

A. No, sir.

Q. You knew he was in the opium business when you knew him in El Paso, did you not?

A. No, sir.

Q. You didn't know what business he was in?

A. He was just a boy when I knew him in El Paso.

Q. When you knew him here, did you know he was in the opium business? A. No, sir.

Q. He didn't tell you? A. No, sir.

Q. And you didn't know what business he was in?

A. No, sir.

Q. Did it ever occur to you to ask him what business he was in?

A. No, sir; I thought he was in the race-horse business. [148]

Q. Did he have plenty of money?

A. He seemed to make bets at the races; that is all I knew about him.

Q. Did he stop at any hotel that you were clerking in? A. He is stopping now at the Hotel Ray.

Q. At the hotel you are clerking in?

A. Yes, sir.

Q. Under what name? A. George Poole.

Q. Did he ever sign the name of Spencer?

A. No, sir.

Q. Did he ever sign the name of Moore?

A. No, sir.

Q. Did you ever know him under those names?

A. No, sir.

Q. And you have known him for two years in San

(Testimony of Arthur Heatherly.)

Francisco and never asked him what his business was?

A. I don't think he has been here—I think only about a year since I first met him here; I don't suppose it is quite that long.

Q. And you didn't ask him during all that time what business he was in?

A. I thought he had horses at Juarez. That was my understanding.

Q. What made you understand that?

A. Well, he was playing the races; that is all he seemed to be doing.

Q. Playing races in San Francisco during the last year? A. I think so.

Q. Whereabouts? Whereabouts was he playing races in San Francisco during the last year?

A. Well, that might put somebody else in.

Q. That is all right? A. I cannot say.

Q. Whereabouts was he playing races in the last year in San Francisco.

Mr. DANFORD.—By “playing” do you mean betting on races?

Mr. SELVAGE.—I am using his own language?

Mr. PRICE.—Answer the question?

A. Well, at a cigar-store or two on Ellis Street.

Mr. SELVAGE.—Q. Tell me the names of the places? A. The Gastronomic Club. [149]

Q. And what cigar-stores?

A. I don't remember the names of the cigar-stores; I don't know them; they are located on Ellis Street.

(Testimony of Arthur Heatherly.)

Q. How did you come to know that he was playing the races there?

A. I was up there and saw him play.

Q. Were you playing the races too? A. No, sir.

Q. But you were there and saw him playing the races? A. Yes, sir.

Q. How long since you saw him playing the races the last time? A. It must be 4 or 5 months.

Q. And because he was betting on the races there was the only reason you thought he was in the race-horse business?

A. Well, I never asked him his business.

Q. How did you come to be listening to the story of Louie Sang? A. I went up there with Moore.

Q. Did he ask you to go there and listen to it?

A. He did not ask me to go up there; he said, "Come on and take a walk with me."

Q. When he was talking with Louie Sang, how did you happen to be there?

A. I went up there with Mr. Moore.

Q. Did he ask you to listen to the conversation?

A. No.

Q. And he asked the questions, did he?

A. Yes, sir.

Q. Were you subpoenaed as a witness?

A. No, sir.

Q. You came of your own accord here, did you?

A. Yes, sir.

Redirect Examination.

Mr. DANFORD.—Q. In other words, Mr. Moore simply took you there and you listened to the con-

(Testimony of Arthur Heatherly.)

versation,—you considered you were listening to something to testify to; is that correct?

A. Yes, sir.

Q. And he asked you to come and testify to what you heard? A. Yes, sir.

Q. And you volunteered to come? A. Yes, sir.

Q. He offered you no consideration of any kind, did he? A. No, sir.

Mr. PRICE.—That is the case for the defense.
[150]

Testimony of E. E. Enlow, for the Government.

E. E. ENLOW, called for the United States in rebuttal, sworn.

Mr. SELVAGE.—Q. What is your name?

A. E. E. Enlow.

Q. What position do you occupy with the Government, if any? A. Inspector of Customs.

Q. Do you know John Smith? A. I do.

Q. Do you know the witness who testified here for the defense, Sananes?

A. I saw him once before to-day.

Q. Where did you see him?

A. I think it was the Grand Hotel.

Q. State whether or not you were with Mr. Smith at the time you had the conversation with him that he described upon the stand. A. Yes, sir.

Q. What was the conversation that took place between Mr. Smith and the witness?

A. Well, Mr. Smith tried to find out whether he knew these men and he said yes, he knew those men, he got acquainted with them in Juarez when he was

(Testimony of E. E. Enlow.)

bull-fighting there, and he told us that he didn't know anything about them more than that.

Q. Did Mr. Smith on that occasion or did you try to influence him to tell anything that was not true?

A. We did not.

Q. Did you at that time or did Mr. Smith tell him that these men would throw him down, or that they called him a Greaser, and he said that he could not testify to anything against them because it would be false; was there any question of that kind?

A. I have no recollection of any talk of that kind.

Q. You don't recollect any talk of that kind?

A. No, sir.

Q. Would you remember it? Why would you not remember it, if there was any?

A. I would remember it if he asked him to state anything that was not true.

Q. Did he on that occasion ask him to state anything that was not true? A. He did not.

Q. Did he ask him to make any statement whatever against these defendants in order to help the Government, except what was true? [151]

A. He did not.

Mr. SELVAGE.—That is all.

Mr. DANFORD.—That is all.

Mr. SELVAGE.—The Government rests.

Charge to the Jury.

The COURT.—This charge, gentlemen, is one of conspiracy in two counts, the first count being substantially a conspiracy for knowingly and unlawfully importing opium into the United States from Mexico

by way of El Paso, and, the second count is substantially for the alleged offense of conspiring wilfully, unlawfully and knowingly to receive, conceal and facilitate the transportation and concealment after importation of opium referred to in the first count.

The section denouncing the offense of conspiracy is as follows:

“If two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties will be punished as therein provided.”

The indictment here charges, first, the conspiracy, and then the doing of certain acts to effect the purpose thereof. These acts, broadly speaking, are, first, the importation of opium from Mexico by way of El Paso to San Francisco; second, the delivery to Chang Kow of certain contraband opium; third, the taking of certain trunks for smuggling opium from 1346a Stevenson Street to 61 Duboce Avenue, in this city; fourth, the purchase of tickets from Trinidad, Colorado, to San Francisco, and the payment of excess baggage on trunks containing opium to San Francisco. It is essential that both the conspiracy and the doing of one or more of these acts [152]. in furtherance thereof be established before the defendants can be convicted; it is not necessary, however, that all of the overt acts alleged shall be proved. It is sufficient to prove any one of them, if done to effect the purpose of the conspiracy charged.

A conspiracy is a combination of two or more by some concert of action to accomplish some criminal

or unlawful purpose, or some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

The Act of February 9, 1909, provides, "that after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof; Provided, that opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medical purposes only, under the regulations which the Secretary of the Treasury is hereby authorized to prescribe."

Sec. 2 provides, "that if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof, he shall be punished as provided."

The Act further provides, that whenever on trial for a violation of this section, the defendant is shown to have, or to have had, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.

The Court instructs the jury that evidence in proof of conspiracy will generally be circumstantial, and it is not necessary, [153] for the purpose of showing the existence of the conspiracy, for the Government to prove that the defendant and some other person or persons came together and actually agreed

upon a common design or purpose, and agreed to pursue such common design and purpose in the manner agreed upon. It is sufficient in such common design and purpose is shown to your satisfaction by circumstantial evidence.

While it is necessary, in order to establish the existence of a conspiracy, to prove a combination of two or more persons by concern of action to accomplish a criminal or unlawful purpose, yet it is not necessary to prove that the conspirators came together and entered into a formal agreement to effect such purpose; but such common design may be regarded as proved if the jury believe from the evidence that the parties to such conspiracy were actually pursuing in concert the common design or purpose, whether acting separately or together, by common or different means, provided they all were leading to the same unlawfully result.

If you find from the acts of the parties, as proven, and from all the facts and circumstances in evidence, believe, beyond a reasonable doubt, that the defendants did pursue the common object of importing, or concealing the opium as charged in the indictment, and by the same means, one performing one part, and another another part, so as to accomplish the common object, then you will be justified in the conclusion that the defendants were engaged in a conspiracy to effect that object. It is not necessary to show that the conspiracy, if proved, originated at the exact time charged in the indictment. While it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons, by concerted

action to accomplish the criminal or unlawful purpose alleged in the indictment, yet it is not necessary to prove that the parties ever came together and entered into any [154] formal agreement or arrangement between themselves to effect such purpose; the combination, or common design, or object, may be regarded as proved. If you believe from the evidence beyond a reasonable doubt, that the parties charged were actually pursuing in concert, the unlawful object stated in the indictment, whether acting separately or together, by common or different means; providing all were leading to the same unlawful result.

In this case four defendants named and others unknown have been jointly indicted for the crime of conspiracy and two of them are being jointly tried for that offense. The Court instructs the jury that a conspiracy cannot exist when only one person is concerned, but two or more persons must participate in such alleged conspiracy to make it a crime.

If you find from all the evidence that only one defendant was concerned in the acts charged in the indictment, then you must find the defendants not guilty. If you find that the acts charged in the indictment were committed by one defendant only and none of the other defendants nor any other person took part in such acts or aided or assisted in them, and that such acts were not done pursuant to a common design among them, it will be your duty to return a verdict of not guilty in favor of both the defendants.

Mere knowledge of the existence of a conspiracy,

on the part of any of the defendants does not make that person a party to such conspiracy, but the evidence must show beyond a reasonable doubt, and to a moral certainty, that such defendant not only knew of the conspiracy, but participated in such conspiracy, and, if you do not so find from the evidence, you must acquit.

If from the evidence the jury believe that the defendants, or [155] either of them may have had any transactions involving the handling of opium in a foreign country and believe that such transactions were not continued in the United States as alleged in the indictment you must acquit the defendants.

The mere presence of opium in the specimens presented for your consideration does not necessarily prove that, if the jury concludes that such specimens were from opium, that such opium was imported unlawfully from Mexico by way of El Paso into the United States as charged in the indictment.

If you find that contraband opium was in the possession of the defendants, or either of them, in pursuance of a conspiracy, that fact is sufficient to establish the overt act of having such opium in his possession, unless explained by the defendant.

It is your duty under the law when examining or deliberating upon the exhibits of any kind to give close attention to the testimony concerning each specific exhibit.

If you find from the evidence and believe that it is established beyond a reasonable doubt that one of the defendants other than the two defendants on trial is the person solely responsible for the presence in the

case of any exhibits and further believe that the defendants on trial had no guilty knowledge of any of the transactions of the said defendant not on trial you should acquit the defendants.

It is the legal right of the defendants to refrain from giving testimony and the fact that they do or do not give testimony should be ignored by the jury.

In the matter of considering expert testimony great care and caution is required and witnesses testifying as experts should not be given any greater credibility for any of their testimony [156] which may not be technical than would be given to a witness who is not an expert in giving the same kind of evidence.

It is a well-settled rule in criminal law that the acts of an accomplice are not evidence against the accused, unless they constitute a part of the things or matters accompanying and incident to an act, transaction or event, and occur during the pendency of the criminal enterprise, and are in furtherance of its object.

If you find that a conspiracy was established, the act or declaration of any defendant during its continuance and in furtherance of its object is the act or declaration of all of the parties to the conspiracy.

The fact that a co-defendant was standing or passing by and saw a crime committed, if a crime was committed, is not of itself evidence of a conspiracy.

Any admissions or declarations of a co-conspirator made after the consummation of a conspiracy are not to be considered by the jury against anyone except the person making them.

If the jury believe that the acts of the individual defendants were done by them, but without agreement or concert with each other, the *the* defendants cannot be said to be guilty of conspiring to commit the acts which are charged to have been committed by them.

While it is permissible in the Federal Courts to convict upon the uncorroborated testimony of an accomplice, you are instructed that before convicting the defendants on the uncorroborated testimony of an accomplice or accomplices, you should view such testimony with great care and caution. The testimony of an accomplice, therefore, ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution. [157]

The defendants are clothed with the presumption of good character and this presumption of good character is their right, to which the defendants are entitled and of which the defendants cannot be deprived under the law.

If any witness examined before you has wilfully sworn falsely as to any material matter it is your duty to distrust the entire testimony of such witnesses.

Before you can convict the defendants in this case, it must appear, from the evidence, beyond a reasonable doubt, that the defendants, and not somebody else, are guilty of the offense charged in the indictment. It is not sufficient that the evidence shows, if it does so show, that the defendants or somebody else committed the crime, nor that the probabilities are that the defendants and not somebody else com-

mitted the crime, unless those probabilities are so strong as to remove all reasonable doubt as to whether the defendants or someone else is the guilty party; and it is a rule of law that although it may be positively proved that one of two or more persons committed a crime, yet if there is any reasonable doubt as to which is the guilty party, all must be acquitted.

So far as the identity of the defendants is concerned, if you believe from the evidence and the circumstances proved, that there is a reasonable doubt whether a witness or witnesses might not have been mistaken as to the defendants' identity, then you would not be authorized to convict the defendants; unless the corroborating circumstances tending to establish their identity are such as, with other testimony, produces a degree of certainty in the minds of the jury so great that they can say that they have no reasonable doubt of the identity of the defendants.

The law presumes the defendants to be innocent of the [158] crime charged, and this presumption continues in their favor throughout the trial, step by step; and you cannot find the accused guilty of any of the crimes charged in the indictment unless the evidence in the cases satisfies you beyond a reasonable doubt of their guilt. So long as any of you have a reasonable doubt as to the existence of any one of the several elements necessary to constitute the offense or offenses charged, the accused cannot be convicted.

If, after the consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendants, it is the duty of such juror to give the defendants the benefit of that doubt and to vote

for their acquittal so long as he retains such doubt.

When the evidence against the defendants is made up wholly of a chain of circumstances and there is a reasonable doubt as to one of the facts essential to establishing guilt it is the duty of the jury to acquit. In order to convict the defendants upon the evidence of circumstances it is necessary not only that all the circumstances concur to show that they committed the crime charged, but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty and beyond all reasonable doubt every other hypothesis but the single one of guilt, or the jury should find the defendants not guilty.

It is not sufficient to establish a proof, although a strong one, arising from the doctrine of chances that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the charge to a reasonable and moral [159] certainty, a certainty which convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

Mere probabilities or suspicions are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of the indictment, nor is it sufficient that from the doctrine of chance it is more probable that the defendant is guilty than innocent to warrant conviction.

Circumstances of suspicion no matter how grave or strong are not proof of guilt, and the defendants must be found not guilty unless the facts of their guilt are proved beyond a reasonable doubt.

Certain evidence has been ordered stricken from the record. I instruct that you will not consider or make any deductions or conclusions from the evidence so stricken out.

The defendants at the outset of the trial, are presumed to be innocent men. They are not required to prove themselves innocent. In considering the testimony in this case, you must look at that testimony and view it in the light of that presumption, a presumption that abides with the defendants throughout the trial of the case, during your deliberations, and until you have arrived at a verdict.

While the prosecution is bound to prove the defendants' guilty of the offense charged in the indictment to a moral certainty and beyond all reasonable doubt before you can find them guilty, a different rule applies to the testimony and proof offered on behalf of the defendants. The defendants are not obliged nor called upon to prove any fact in their favor beyond a reasonable doubt. If the proof offered by the defendants [160] creates in your mind a reasonable doubt as to their guilt, or as to the truth of any material fact necessary to constitute the crime charged in the indictment, it is your duty to acquit the defendants. If the proof offered by the defendants has created or raised in your minds a reasonable doubt as to their guilt of the offense charged in the indictment, or as to the truth of any material fact

necessary to constitute such offense, you should acquit.

The term "reasonable doubt" is not a mere figure of speech, nor is it to be lightly looked upon by the jury. It is a substantial right given by the law, that no person shall be convicted of any crime unless his guilt is proved beyond all reasonable doubt. You must be satisfied of the guilt of the defendant. If not so satisfied of their guilt beyond all reasonable doubt, it is your duty to acquit them. Each and every juror should be satisfied of the guilt of the defendants to a moral certainty, and beyond all reasonable doubt, before he agrees to a verdict of guilty. As long as any one juror entertains a reasonable doubt of the defendants' guilt, he should withhold his assent to a verdict of guilty, but this does not mean that any juror should obstinately adhere to his opinion when convinced that he is wrong.

In every crime or public offense there must exist a union or a joint operation of act and intent or criminal negligence. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused person. All persons are of sound mind who are neither idiots, lunatics or are affected with insanity.

If the evidence in this case tends to, or may reasonably support two theories or conclusions, one consistent with the defendants' guilt and the other consistent with their innocence, then it is [161] your duty as jurors in this case to reject the one tending to show guilt and adopt the one tending to show innocence.

Now, we have had the term “reasonable doubt.” A reasonable doubt of the guilt of a defendant is a doubt based upon reason, and which is reasonable in view of all the evidence—an honest, substantial misgiving, generated by insufficient proof—and not a captious doubt, or a doubt suggested by the ingenuity of counsel and unwarranted by the testimony. It must be supported by reason and not by mere conjecture and idle supposition irrespective of evidence.

A reasonable doubt is not a mere whim, but is such a doubt as reasonable men may entertain after a careful consideration of all of the evidence in the case. It is such a doubt as reasonable men of sound judgment, without bias, prejudice or interest, after calmly conscientiously and deliberately weighing the testimony, would entertain as to the guilt of the defendants. It is a substantial doubt arising from the evidence or from a want of evidence in the case.

The term “reasonable doubt,” therefore, means just what its language imports. To be a reasonable doubt it must be based upon reason. There is hardly anything relating to human affairs that is not open to some possible or fanciful or imaginary doubt. Mere possible or fanciful or imaginary doubts are not reasonable doubts. But a reasonable doubt is defined to be that state of the case which, after an entire comparison of all the evidence, leaves the minds of the jury in that condition that they cannot say that they have an abiding conviction to a moral certainty of the truth of the charge.

You understand that it requires the concurrence of all of you to agree upon a verdict, and if you so

agree, you will have [162] such verdict signed by your foreman and returned into Court.

(Thereupon the jury retired to deliberate upon its verdict and subsequently returned into Court and rendered a verdict finding both defendants guilty on all counts in the indictment.)

The COURT.—What time will we fix for judgment?

Mr. PRICE.—One week from to-day, your Honor.

The COURT.—What is the amount of bail on which these defendants are at large?

The CLERK.—\$5,000 as to each defendant.

Mr. McKINLEY.—If your Honor please, with reference to the matter of bail, now that the case has been concluded and a verdict rendered, I deem it my duty to say to the Court that each of these defendants has previously suffered a conviction for the smuggling of opium, in the Southern District of California, one having been imprisoned in the Leavenworth penitentiary and one in the County Jail. It seems to me, under those circumstances, that both of these defendants should be put in the custody of the Marshal.

Mr. PRICE.—While that is a fact, your Honor, one of the defendants came here by himself from El Paso and—

The COURT.—The order asked for by the District Attorney will be made, the defendants will be committed to the custody of the Marshal.

Mr. DANFORD.—No bail fixed at all.

The COURT.—No bail fixed pending judgment.

The foregoing contains all of the testimony and

evidence both oral and documentary, and a full statement of the proceedings in the case.

The defendants Thomas Andrews *alias* Thomas J. Murphy and [163] George Olin Poole, *alias* Charles Moore hereby present the foregoing as their Bill of Exceptions herein, and respectfully ask that the same may be allowed, signed, sealed and made a part of the record in this case.

Dated: June 6th, 1914.

GEORGE E. PRICE,

Attorney for said Defendants, Thomas Andrews,
alias Thomas J. Murphy and George Olin Poole,
alias Charles Moore.

**Stipulation and Order Settling and Allowing Bill of
Exceptions.**

It is hereby stipulated and agreed that the foregoing Bill of Exceptions is true and correct, and that the same may be allowed and settled by the Court.

Dated: June 8th, 1914.

JOHN W. PRESTON,

United States Attorney and Attorney for Plaintiff.

GEORGE E. PRICE,

Attorney for Defendants, Thomas Andrews *alias*
Thomas J. Murphy and George Olin Poole,
alias Charles Moore.

The above and foregoing Bill of Exceptions is hereby settled and allowed by me this 9th day of June, A. D. 1914.

M. T. DOOLING,

Judge.

Due service and receipt of a copy of the within Bill of Exceptions this 6th day of June, 1914, is hereby admitted.

WALTER E. HETTMAN,
Asst. United States Attorney, Northern District of
California.

[Endorsed]: Filed Jun. 9, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [164]

*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

No. 5345.

THE UNITED STATES OF AMERICA,

vs.

GEORGE POOLE, *alias* GEORGE MOORE et al.

Verdict.

We, the jury, find George Poole, *alias* George
Moore, the defendant at the bar, Guilty on all counts.

JOHN T. GILMARTIN,
Foreman.

[Endorsed]: Filed Nov. 22, 1913, at 5 o'clock and
50 minutes P. M. W. B. Maling, Clerk. By Francis
Krull, Deputy Clerk. [165]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5345.

THE UNITED STATES OF AMERICA,

vs.

THOMAS ANDREWS, *alias* THOMAS J. MURPHY, et al.

Verdict.

We, the Jury, find Thomas Andrews, *alias* Thomas J. Murphy, the defendant at bar, Guilty on all counts.

JOHN T. GILMARTIN,

Foreman.

[Endorsed]: Filed Nov. 22, 1913, at 5 o'clock and 50 minutes P. M. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [166]

*In the United States District Court in and for the
Northern District, State of California.*

No. 5345.

Div. No. 2.

UNITED STATES

vs.

THOMAS ANDREWS, *alias* ———, GEORGE POOLE, *alias* ———, et al.

Motion to Set Aside Verdict and Motion for New Trial.

Now comes the defendants through their attorneys and move the Court for a new trial and in support

thereof urges the following grounds:

1.

That the verdict is against the law and contrary to the evidence.

2.

That the verdict is not supported by the evidence and that the evidence is insufficient to support the verdict.

3.

That the Court committed manifest error affecting the substantial rights of the defendants during the trial of the case, that were duly and regularly excepted to by the defendants.

4.

That the indictment in said cause fails to state an offense against the laws of the United States.

5.

On the ground that newly discovered evidence has been found, which newly discovered evidence is material to the defense of defendants, and which defendants had no means of knowing would be material until the close of the trial; that said newly discovered [167] evidence, if introduced on behalf of the defendants, would effectually dissipate any of the plaintiff's testimony concerning certain packages alleged to have been handled by defendants in and about Nogales, Old Mexico; and defendants aver that said newly discovered evidence is not merely cumulative, but was indispensable, and is material, to the proper defense. Defendants further show that it was impossible, with reasonable diligence, which was always exercised heretofore by defendants,

to have discovered prior to trial, or prior to the midst of trial, the aforesaid newly discovered evidence, and that said newly discovered evidence will fully and completely exonerate the defendants and each of them from any effect of testimony given by witnesses for the Government from Nogales, Old Mexico. Defendants respectfully refer to the affidavits hereto attached and made a part hereof, in further support of matters herein pertaining to newly discovered evidence.

6.

That the defendants were surprised by the testimony of Louie Sang, the Chinese witness *from* whom defendants placed upon the witness-stand pursuant to statements made by said witness in the corridor of this court building, and which testimony serving as a surprise to the defendants, afforded defendant no opportunity for or preparation to overcome said testimony by showing the falsity thereof.

In support of said motion for a new trial, the defendants hereby refer to and make a part hereof all of the records, evidence and proceedings in the above-entitled case, together with the affidavits filed herewith relating to newly discovered evidence.

Wherefore the defendants pray that said motion to set aside verdict and motion for a new trial be granted.

GEORGE E. PRICE,
GILBERT D. BOALT,
Attorneys for Defendants. [168]

*In the United States District Court in and for the
Northern District, State of California.*

UNITED STATES

vs.

ANDREWS et al, POOLE et al.

**Affidavit of George G. Sauer [in Support of Motion
for New Trial].**

George G. Sauer, being duly sworn, deposes and says: That he is a resident of El Paso, in the State of Texas and Republic of the United States, that he is engaged in the business of general brokerage, in El Paso, Texas, and at Ciudad Juarez, Mexico, being known as a general commission broker, and in the course of such business as general commission broker, he transacts business for the branch bank of the Bancho Nacional de Mexico, located at Ciudad Juarez, Mexico, State of Chihuahua. That on or about the 8th day of June, A. D. 1913, he delivered at Juarez, Mexico, to George Moore, also known as George Poole, an order from the branch bank of the Banco Nacional de Mexico, of Juarez, Mexico, directed to the branch bank of the Banco Nacional at Nogales, Sonora, Mexico, directing the said branch bank of the Banco Nacional at Nogales, Sonora, Mexico, to deliver to the said George Moore or his order, certain boxes marked Amapol, then in the possession, care and custody of the branch bank of the Banco Nacional de Mexico, at Nogales, Sonora, Mexico, with instructions of said Juarez branch bank of the Banco Nacional of Mexico, to the Nogales

office of the Banco Nacional de Mexico, to use all their power and influence with the Mexican custom-house authorities, to help George Moore to ship the said cases Amapol to Cananea, State of Sonora, Republic of Mexico, and there at Cananea to be delivered to the Bank at Cananea, Sonora, Mexico. A few days subsequent to the 10th day of June, 1913, the Banco Nacional de Mexico, branch at Juarez, Mexico, [169] informed me of having received acknowledgment from the Banco Nacional de Mexico, branch at Nogales, Sonora, Mexico, that they would deliver the cases of Amapol to George Moore and assist him all possible to have the cases forwarded to Cananea, Sonora, Mexico. Subsequently the Banco Nacional de Mexico, branch at Nogales, Sonora, Mexico, also informed their branch *branch* bank at Juarez, Mexico, that their instructions were complied with, regarding the cases of Amapol; in other words, the cases Amapol had been forwarded to Cananea, Mexico, as per their instructions.

Deponent further saith, that to his best knowledge and belief, George Moore, as well as the branch bank of the Banco Nacional de Mexico at Juarez, Mexico, merely acted as agents to have the cases Amapol removed from Nogales, Sonora, Mexico, to Cananea, interior of the State of Sonora, Mexico, with a view of safekeeping and all instructions and orders, the Banco Nacional de Mexico branch bank at Nogales, Sonora, Mexico, received regarding the disposal of the cases Amapol, were to forward them to Cananea, Sonora, Mexico.

Further affiant saith not.

GEORGE G. SAUER.

Subscribed and sworn to before me this 28th day of November, A. D. 1913, at El Paso, County of El Paso, State of Texas.

[Seal] J. W. MAGOFFIN,
Notary Public in and for the County of El Paso,
State of Texas.

My commission expires May 31, 1915. [170]

*In the United States District Court in and for the
Northern District, State of California.*

UNITED STATES

vs.

ANDREWS et al., POOLE et al.

**Affidavit of Paulino Fontes [in Support of Motion
for New Trial].**

PAULINO FONTES.

AFFIDAVIT OF ~~PABLINA FONTAS.~~

City of Nogales,

State of Sonora,

Republic of Mexico,—ss.

PAULINO FONTES,

~~PABLINO FONTAS~~, being first duly sworn, deposes and says: That he is an officer of the Government of the Republic of Mexico, his specific official designation being Commandante de Los Inspectores.

That on or about the 10th day of June, 1913, at the request of George Moore, he checked for railroad transportation four (4) boxes marked "AMOPOL"

to be transported from Nogales, State of Sonora,
Cananea,
Republic of Mexico, to ~~Cananea~~, Republic of
Mexico.

Further affiant saith not.

PAULINO FONTES.

Subscribed and sworn to before me at Nogales,
Ariz., this 25th day of Nov., 1913.

[Seal]

OTTO H. HEROLD,
Notary Public.

My commission expires Feby. 23, 1916.

Corrections on line 5-12-19 were made by me.

OTTO H. HEROLD,
Notary Public. [171]

*In the United States District Court in and for the
Northern District, State of California.*

UNITED STATES

vs.

ANDREWS et al., POOLE et al.

**Affidavit of Mettie Smith [in Support of Motion for
New Trial].**

City of El Paso,
County of El Paso,
State of Texas,—ss.

Mettie Smith, being first duly sworn, deposes and
says:

That she conducts a boarding-house at the city of
El Paso, State of Texas; that she is personally ac-
quainted with George Moore, who is also known as

George Poole; that said George Moore was a guest at her house as a boarder from about the 10th day of February, 1913, until some time in the first part of April, 1913. That during said time, to affiant's personal knowledge, said George Moore was constantly in the City of El Paso, State of Texas.

Further affiant saith not.

METTIE SMITH.

Subscribed and sworn to before me this 28th day of November, A. D. 1913, at El Paso, State of Texas.

[Seal]

GEORGE HAILE,

Notary Public in and for the County of El Paso,
State of Texas.

Correction of spelling name, line 12, made by
me.

GEO. HAILE. [172]

*In the United States District Court in and for the
Northern District, State of California.*

UNITED STATES

vs.

ANDREWS et al., POOLE et al.

**Affidavit of Charles E. Matthews [in Support of
Motion for New Trial].**

City of El Paso,
County of El Paso,
State of Texas,—ss.

Charles E. Matthews, being first duly sworn, deposes and says: That he is a Police Detective in the City of El Paso, State of Texas. That affiant is per-

sonally acquainted with George Moore, also known as George Poole; and affiant further states that to his own personal knowledge the said George Moore was constantly in El Paso during the months of December, 1912, January, February, and March, 1913.

CHAS. E. MATTHEWS.

Subscribed and sworn to before me this 29th day of November, A. D. 1913, at El Paso, State of Texas.

[Seal]

K. C. HARTNETT,

Notary Public in and for the County of El Paso,
State of Texas.

All corrections and erasures were made by me.

H. C. HARTNETT,

Notary Public. [173]

*In the United States District Court in and for the
Northern District, State of California.*

UNITED STATES

vs.

ANDREWS et al., POOLE et al.

**Affidavit of James Newton [in Support of Motion
for New Trial].**

City of El Paso,

County of El Paso,

State of Texas,—ss.

James Newton, being first duly sworn, deposes and says: That he is a Police Officer of the City of El Paso, State of Texas. That affiant is personally acquainted with George Moore, also known as George

Poole; and affiant further states that to his own belief personal knowledge the said George Moore was constantly in El Paso during the months of December, 1912, and January, February and March, 1913.

JAMES NEWTON,

Subscribed and sworn to before me this 28th day of November, A. D. 1913, at El Paso, State of Texas.

[Seal]

JUAN SMITH,

Notary Public in and for the County of El Paso, State of Texas.

Change from "knowledge" to "belief" on line 16 made by me.

JUAN SMITH. [174]

In the United States District Court in and for the Northern District, State of California.

UNITED STATES

vs.

THOMAS ANDREWS, *alias* ———, GEORGE POOLE, *alias* ——— et al.

Affidavit of Louise Lorraine [in Support of Motion for New Trial].

State of California,

City and County of San Francisco,—ss.

Louise Lorraine, being first duly sworn, deposes and says:

That on the 22d of November, 1913, she witnessed a conversation between George E. Price, Esq., one of the attorneys in the above-entitled case, and Louis

Sang, a Chinaman; that the conversation was all in English; that the said Louis Sang spoke English very fluently; that the said Louis Sang stated to George E. Price, Esq., that he had not purchased any opium from George Poole, one of the *defendant* in the above-entitled case, since early in the year of 1909; that Mr. Price interrogated the said Louis Sang carefully upon this subject; that said Louis Sang repeatedly stated that he had not purchased any opium from George Poole since early in the year of 1909. Affiant further states that Mr. Price asked the Chinaman if George Poole or Thomas Murphy had sold him opium since the year of 1909, that said Louis Sang again repeated that he had not.

LOUISE LORRAINE.

Subscribed and sworn to before me this 3d day of
December, A. D. 1913, at San Francisco, State of Cali-
fornia.

[Seal] LESTER G. BURNETT,
Notary Public in and for the City and County of
San Francisco, State of California. [175]

*In the United States District Court in and for the
Northern District, State of California.*

No. 5345.

Div. No. 2.

UNITED STATES

VS.

THOMAS ANDREWS, *alias* ———, GEORGE
POOLE, *alias* ——— et al.

**Affidavit of Defendant George Poole on Motion for
a New Trial.**

State of California,

City and County of San Francisco,—ss.

George Poole, being first duly sworn, deposes and says:

That he is one of the defendants in the above-entitled action. That on the 7th day of October, 1913, defendant was indicted with one Thomas Andrews, *alias* Thomas J. Murphy, Charles Benton and Chung Kaw by the Grand Jury of the United States of America, within and for the Northern District of California, on two counts, charging defendants with a violation of Section 37, Criminal Code of the United States, and Act of February 6th, 1909.

That on the 22d day of November, 1913, defendants were found guilty on both counts of indictment above referred to.

That since that 22d day of November, 1913, new evidence has been discovered material to defendants which could not with reasonable diligence have been discovered and produced at the trial of defendants.

That the evidence so discovered is set forth in the affidavits of George Sauer, Paulino Fontas, Mettie Smith, Charles E. Matthews, James Newton and Louise Lorraine, respectively, which affidavits set forth the facts to which said affiant would testify upon a new trial of the above-entitled action.

That affiant is of the opinion that in event that defendant's [176] motion for a new trial is granted that upon the introduction evidence of the

facts set forth in the above and foregoing affidavits, that a verdict different from the one heretofore rendered against defendants will be found upon said new trial.

[Seal]

GEO. O. POOLE.

Subscribed and sworn to before me this 3d day of December, 1913.

LESTER G. BURNETT,
Notary Public in and for the City and County of
San Francisco, State of California. [177]

*In the United States District Court in and for the
Northern District, State of California.*

No. 5345.

Div. No. 2.

UNITED STATES

vs.

THOMAS ANDREWS *alias* ———, GEORGE
POOLE *alias* ——— et al.

**Affidavit of George E. Price, Esq., on Motion for
New Trial.**

State of California,
City and County of San Francisco,—ss.

George E. Price, Esq., being first duly sworn, deposes and says:

That he is one of the attorneys for defendants in the above-entitled action and was such attorney during the trial of the defendants in the above-entitled action.

That since the trial of said defendants new evidence has been discovered material to the defend-

ants, which could not with reasonable diligence have been discovered and produced at the trial.

That said newly discovered evidence is set forth in the affidavits of George Sauer, Paulino Fontes, Nettie Smith, Charles E. Matthews, James Newton and Louise Lorraine, which affidavits set forth the evidence to which said affiants will testify upon new trial of said action.

That affiant is of the opinion that in the event that defendants' motion for a new trial is granted that upon the introduction of in evidence of the before and foregoing facts as set forth in the above-mentioned affidavits, that a verdict different from the one heretofore rendered against these defendants will be found upon said new trial.

GEORGE E. PRICE.

Subscribed and sworn to before me this 3d day of December, A. D. 1913.

[Seal] LESTER G. BURNETT,
Notary Public in and for the City and County of
San Francisco, State of California. [178]

Receipt of service motion to set aside verdict and motion for a new trial and affidavits of George G. Sauer, Paulino Fontes, Mettie Smith, Charles E. Matthews, Louise Lorraine, George Pool and George E. Price, Esq.

Acknowledged this 3d day of December, 1913.

BENJ. L. McKINLEY,
U. S. Attorney.
THOS. H. SELVAGE,
Asst. U. S. Attorney.

[Enclosed]: Filed Dec. 3, 1913. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [179]

*In the United States District Court in and for the
Northern District, State of California.*

UNITED STATES

vs.

ANDREWS et al., POOLE et al.

**Affidavit of Nellie Black [in Support of Motion for
New Trial].**

City of El Paso,
County of El Paso,
State of Texas,—ss.

Nellie Black, being first duly sworn, deposes and says: That affiant conducts a boarding-house in the City of El Paso, State of Texas; that she is personally acquainted with George Moore, who is also known as George Poole; that said George Moore was a guest at her house as a boarder from the 22d day of December, A. D. 1912, until about the 10th of February, 1913. That during said time, to affiant's own knowledge, said George Moore was constantly in the City of El Paso, State of Texas.

Further affiant saith not.

NELLIE BLACK.

Subscribed and sworn to before me this sixth day
of December, A. D. 1913, at El Paso, Texas.

Notary Public in and for the County of El Paso,
State of Texas. [180]

State of Arizona,
County of Maricopa,—ss.

Before me, George W. Elias, a Notary Public in and for said County, State of Arizona, on this day personally appeared Nellie Black, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this sixth day of December, A. D. 1913.

[Seal]

GEORGE W. ELIAS,

Notary Public.

My Commission expires May 27, 1917.

Receipt of copy of within affidavit acknowledged this 10th day of Dec., 1913.

WALTER E. HETTMAN,

Asst. U. S. Atty.

[Endorsed]: Filed Dec. 10, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [181]

*In the United States District Court in and for the
Northern District, State of California.*

UNITED STATES

vs.

THOMAS ANDREWS *alias* ———, GEORGE
POOLE *alias* ——— et al.

Motion in Arrest of Judgment.

The defendants in the above-entitled cause before Judgment respectfully move the Court for order ap-

pearing on the face of the Indictment and upon the Record that Judgment for the Government be arrested and suspended and the conviction rendered therein be declared null and void.

Said Motion is based on the following grounds:

1.

That the first count of the Indictment herein fails to charge any offense against the laws of the United States.

2.

That the second count of the Indictment herein fails to charge any offense against the laws of the United States.

3.

That the Grand Jury by which the Indictment herein was found had no legal authority to inquire into the offense charged in count one of said Indictment by reason of its not being within the legal jurisdiction of the Northern District of California.

4.

That the Grand Jury by which the Indictment herein was found had no legal authority to inquire into the offense charged in count two of said Indictment by reason of its not being within the legal jurisdiction of the Northern District of California. [182]

5.

That count one of the Indictment herein and all of the allegations therein included upon which said count is based does not allege any offense of which this Court has jurisdiction.

6.

That count two of the Indictment herein and all of

the allegations therein included upon which said count is based does not allege any offense of which this Court has jurisdiction.

7.

That section 37, C. C. U. S., and Act of February 9, 1909, and each of them, upon which said section and act, count one of the Indictment herein and count two of the Indictment herein respectfully are predicated, so far as either said section or said act may attempt to impose penalties and inflict judgment for the acts, matters or things set forth in said Indictment is, and each of them are, in violation of the Constitution of the United States, and more particularly of section one of the 14th amendment of said Constitution of the United States, also the fifth amendment of said Constitution of the United States and section 858, United States Compiled Statutes of 1901, Act March 16th, 1878, C. 37, and void.

8.

That count one of said Indictment herein is in other respects informal and is insufficient and defective.

9.

That count two of said Indictment herein is in other respects informal and is insufficient and defective.

10.

That the verdict is against the law and contrary to the evidence.

11.

That the verdict is not supported by the evidence

and that [183] the evidence is insufficient to support the verdict.

12.

That the Court committed manifest error affecting the substantial rights of the defendants during the trial of the case that were duly and regularly excepted to by defendants.

13.

That the Court committed manifest error affecting the substantial rights of the defendants by refusing to allow defendants, or either of them to withdraw their respective pleas of not guilty, which said pleas of not guilty were taken at a time when defendants were not represented by counsel, and permitting defendants, previous to the trial, through their counsel and upon advice of their counsel, to answer, demur to or to plead to the Indictment herein.

14.

That the Court committed manifest error affecting the substantial rights of the defendants at the time that the Government first rested their case, by refusing to permit counsel to argue a motion that the Court instruct the jury to acquit defendants at said time, and by the Court refusing to instruct the jury to acquit the defendants.

15.

That the Court committed manifest error in refusing to grant defendants' motion for a new trial upon newly discovered evidence, which newly *discovered would*, had it been presented to the jury, have dissipated the evidence of the witnesses for the Government, relative to the handling of opium in Nogales,

Sonora, Mexico, which newly discovered evidence with due diligence could not have been discovered on the part of the defendants prior to the trial or during the course of the trial.

16.

That the Court committed manifest error in denying defendants' [184] motion for a new trial upon all of the grounds set forth in said motion for a new trial.

17.

That the Court committed manifest error in denying the motion for a new trial in view of the affidavits in support thereof, which affidavits set forth evidence which would tend to show that one of the defendants had had transactions involving handling of opium in a foreign country, and would tend to prove that the transaction of handling opium in a foreign country has not been continued in the United States.

WHEREFORE defendants pray that said Judgment be arrested and that no sentence be had therein.

GEORGE E. PRICE,

GILBERT D. BOALT,

Attorneys for Defendants.

[Endorsed]: Filed Dec. 10, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [185]

At a stated term of the District Court of the United State of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 10th day of December, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable M. T. Dooling, Judge.

#5345.

UNITED STATES

vs.

THOMAS ANDREWS, *alias*, etc., and GEORGE POOLE, *alias*, etc.

Minutes—Sentence, etc.

The defendants, Thomas Andrews, *alias*, etc., and George Poole, *alias*, etc., each being present in open court with their counsel, said counsel made a motion for a new trial, which after hearing argument, by the Court ordered that said motion be, and the same is hereby denied, to which ruling said defendants then and there duly excepted. The said counsel then made a motion in arrest of judgment, which said motion was by the Court ordered and is hereby denied, to which ruling said defendants then and there duly excepted. The said defendants being now fully informed of the nature of the indictment herein against them, of their arraignment and plea of not guilty, and of their trial and the verdict of the jury finding each of said defendants guilty on all counts of the indictment, and no sufficient cause being shown

or appearing to the court why judgment should not be pronounced against them, now here by the Court ordered that each of said defendants be imprisoned in the State Penitentiary at San Quentin, Marin County, California, for the term of two years on the first count of the Indictment herein and one year on the second count of the Indictment herein. Further ordered that the said term of imprisonment on the second count of the indictment commence to run at the expiration of the said term of [186] imprisonment on the first count of the indictment. Said defendants each to be imprisoned for the term of three years for the offense of which they stand convicted. Further ordered that execution of judgment herein be stayed for a period of two weeks. [187]

*In the District Court of the United States, for the
Northern District of California, First Division.*

No. 5345.

THE UNITED STATES OF AMERICA

vs.

THOMAS ANDREWS, *alias* THOMAS J. MURPHY and GEORGE POOLE, *alias* GEORGE MOORE.

Judgment on Verdict of Guilty.

CONVICTED OF A CONSPIRACY TO IMPORT,
RECEIVE AND CONCEAL OPIUM.

Benj. L. McKinley, Esq., United States Attorney, and the defendants, with George E. Price, Esq., their attorney came into court. The defendants were duly informed by the Court of the nature of the In-

dictment filed on the 7th day of October, 1913, charging them with the crime of conspiracy to import, receive and conceal opium; of their arraignment and plea of Not Guilty, of their trial and the verdicts of the Jury on the 22d day of November, 1913, to wit: "We, the Jury, find Thomas Andrews, *alias* Thomas J. Murphy, the defendant at the bar, Guilty on all Counts." "We, the Jury, find George Poole, *alias* George Moore, the defendant at the bar, Guilty on all counts."

The defendants were then asked if they had any legal cause to show why judgment should not be pronounced against them, and no sufficient cause being shown or appearing to the Court, and the Court having denied a Motion for New Trial and Motion to set aside the Verdict:

AND WHEREAS, the said Thomas Andrews, *alias* Thomas J. Murphy, and George Poole, *alias* George Moore, having been duly convicted in this Court of the crime of conspiracy to import, receive and conceal Opium;

IT IS THEREFORE ORDERED and ADJUDGED that the said Thomas Andrews, *alias* Thomas J. Murphy and George Poole, *alias* George Moore, each be and is hereby sentenced to be imprisoned for the term of two (2) years on the 1st count of the Indictment and one year on the 2d count of the Indictment. [188]

FURTHER ORDERED that the said terms of imprisonment on the second count of the Indictment commence at the expiration of the sentence on the 1st count of the Indictment.

AND IT IS FURTHER ORDERED that the said terms of imprisonment be executed upon the said Defendants Thomas Andrews, *alias* Thomas J. Murphy, and George Poole, *alias* George Moore, by imprisonment in the State Prison at San Quentin, California.

JUDGMENT entered this 10th day of December, A. D. 1913.

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 5 Judg. and Decrees, at Page 179.
[189]

*In the United States District Court in and for the
Northern District of California.*

No. 5345.

UNITED STATES

vs.

THOMAS ANDREWS, *alias* THOMAS J. MURPHY, GEORGE POOLE, *alias* —, et al.

Petition for Writ of Error and Order Allowing Writ.

Your petitioners, Thomas Andrews, *alias* Thomas J. Murphy, and George Poole, the defendants above named, bring this their petition for Writ of Error to the District Court of the United States, in and for the Northern District of California, and in that behalf your petitioners show that on the 10th day of December, 1913, there was made, given and rendered in the above cause, a judgment against your peti-

tioners wherein and whereby each of your petitioners were adjudged and sentenced to be confined to States Prison at San Quentin, State of California, for a period of three years; and,

Your petitioners show that they are advised by counsel and they aver that there were manifest errors in the records and proceedings had in said cause and in the making, giving, rendition and entry of said judgment and sentence to the great injury and damage of your petitioners, all of which errors will be made more fully to appear by an examination of said records and by an examination of the Bill of Exceptions to be tendered and filed, and in the Assignment of Errors hereinafter set out and to be presented herewith and to the end that said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit. [190]

Your petitioners now pray that a Writ of Error may be issued directed therefrom to the said District Court of the United States for the Northern District of California, returnable according to law and practice of the court, and that there may be directed to be returned pursuant thereto, a true copy of the records, Bill of Exceptions, Assignment of Errors, and all proceedings had in said cause, and that same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that error, if any, has appeared, may be duly corrected and full and speedy justice done your petitioners.

And your petitioners make the Assignment of Errors presented herewith upon which they will rely

and which will be made to appear by a return of said records in obedience to said Writ.

WHEREFORE, your petitioners pray issuance of a Writ of Error and pray that Assignment of Errors presented herewith may be considered as their Assignment of Error from said Writ of Error, and that the judgment rendered in this case may be reversed and held for naught, and that said case be remanded for further proceedings and that there may be awarded a supersedeas upon said judgment and all necessary process including bail.

T. J. MURPHY,
GEORGE POOLE,
Petitioners.

GEORGE E. PRICE,
GELBERT D. BOALT,

Attorneys for Plaintiffs in Error. [191]

Order Allowing Writ of Error and Supersedeas.

The Writ of Error prayed for by the defendants, Thomas Andrews and George Poole is hereby allowed.

That the supersedeas prayed for by said defendants pending the decision upon the Writ of Error is allowed.

The bond for costs upon the Writ of Error is hereby fixed at the sum of one Hundred Dollars.

Dated, San Francisco, Cal., the 15th day of December, 1913.

M. T. DOOLING,
District Judge of the United States Court for the
Northern District of California.

The defendants are admitted to bail each in the sum of \$5000.00 pending the hearing and determination of the Writ of Error herein, the bond to be approved by Hon. Wm. C. Van Fleet, Hon. W. W. Morrow, or Commissioner Francis Krull, and upon such approval the defendants will be released.

Dec. 24, 1913.

M. T. DOOLING,
Judge.

Due service of the within Petition for Writ of Error and Order allowing Writ of Error and Superseas admitted this 24th day of December, 1913.

BENJ. L. McKINLEY,
United States Attorney,
T. H. SELVAGE,
Asst.

[Endorsed]: Filed Dec. 24, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [192]

*In the United States District Court in and for the
Northern District of California.*

No. 5345.

UNITED STATES

vs.

THOMAS ANDREWS, *alias* THOMAS J. MURPHY, GEORGE POOLE, *alias* —, et al.

Assignment of Errors.

THOMAS ANDREWS, *alias* Thomas J. Murphy, and GEORGE POOLE, defendants in the above-entitled cause and plaintiffs in error herein, having petitioned for an order from said Court permitting

them to procure a Writ of Error in this Court directed from the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence made and entered in said cause against Thomas Andrews and George Poole, now make and file with their said petition the following Assignment of Errors herein upon which they will apply for a reversal of said judgment and sentence upon said Writ and which said errors, and each and every one of them are to the great detriment, injury and prejudice of said defendants and violation of the rights conferred upon them by law, and they say in the records and proceedings in the above-entitled cause upon the hearing and determination thereof in the District Court of the United States for the Northern District of California there is manifest error in this, to wit:

1. That said District Court erred in overruling defendants' motion to allow defendants made prior to trial to withdraw their pleas of not guilty for the purpose of interposing a demurrer to the indictment herein.

2. That the Court erred in overruling the motion of defendants made at the close of the case for the motion to instruct the [193] jury to acquit the defendants and by refusing to permit counsel to argue said motion.

3. That the Court erred in overruling the motion of defendants for a new trial and not allowing same on the grounds in said motion taken and assigned, to wit:

(a)

That the verdict is against the law and contrary to the evidence.

(b)

That the verdict is not supported by the evidence and that the evidence is insufficient to support the verdict.

(c)

That the Court committed manifest error affecting the substantial rights of the defendants during the trial of the case, that were duly and regularly excepted to by the defendants.

(d)

That the indictment in said cause fails to state an offense against the laws of the United States.

(e)

On the ground that newly discovered evidence has been found, which newly discovered evidence is material to the defense of defendants, and which defendants had no means of knowing would be material until the close of the trial; that said newly discovered evidence, if introduced on behalf of the defendants, would effectually dissipate any of the plaintiff's testimony concerning certain packages alleged to have been handled by defendants in and about Nogales, Old Mexico; and defendants aver that said newly discovered evidence is not merely cumulative, but was indispensable, and is material, to the proper defense. Defendants further show [194] that it was impossible, with reasonable diligence, which was always exercised heretofore by defendants, to have discovered prior to trial, or prior to the midst of trial, the

aforesaid newly discovered evidence, and that said newly discovered evidence will fully and completely exonerate the defendants and each of them from any effect of testimony given by witnesses for the Government from Nogales, Old Mexico. Defendants respectfully refer to the affidavits hereto attached and made a part hereof, in further support of matters herein pertaining to newly discovered evidence.

(f)

That the defendants were surprised by the testimony of Louis Sang, the Chinese witness whom defendants placed upon the witness-stand pursuant to statements made by said witness in the corridor of this court building, and which testimony serving as a surprise to the defendants, afforded defendants no opportunity for, or preparation to overcome said testimony by showing the falsity thereof.

In support of said motion for a new trial, the defendants hereby refer to and make a part hereof all of the records, evidence and proceedings in the above-entitled case, together with the affidavits filed herewith relating to newly discovered evidence.

4. That the Court erred in overruling and denying defendants' motion in arrest of judgment on the grounds in said motion taken and assigned, to wit:

(a)

That the first count of the Indictment herein fails to charge any offense against the laws of the United States.

(b)

That the second count of the Indictment herein fails to [195] charge any offense against the laws

of the United States.

(c)

That the Grand Jury by which the Indictment herein was found had no legal authority to inquire into the offense charged in count one of said Indictment by reason of its not being within the legal jurisdiction of the Northern District of California.

(d)

That the Grand Jury by which the Indictment herein was found had no legal authority to inquire into the offense charged in count two of said Indictment by reason of its not being within the legal jurisdiction of the Northern District of California.

(e)

That count one of the Indictment herein and all of the allegations therein included upon which said count is based does not allege any offense of which this Court has jurisdiction.

(f)

That count two of the Indictment herein and all of the allegations therein included upon which said count is based does not allege any offense of which this Court has jurisdiction.

(g)

That section 37, C. C. U. S., and Act of February 9, 1909, and each of them, upon which said section and act, count one of the Indictment herein and count two of the Indictment herein respectfully are predicated, so far as either said section or said act may attempt to impose penalties and inflict judgment for the acts, matters or things set forth in said Indictment is, and each of them are, in violation of the

Constitution [196] of the United States, and more particularly of section one of the 14th amendment of said Constitution of the United States, also the fifth amendment of said Constitution of the United States and section 858, United States Compiled Statutes of 1901, Act March 16th, 1878, C. 37, and void.

(h)

That count one of said Indictment herein is in other respects informal and is insufficient and defective.

(i)

That county two of said Indictment herein is in other respects informal and is insufficient and defective.

(j)

That the verdict is against the law and contrary to the evidence.

(k)

That the verdict is not supported by the evidence and that the evidence is insufficient to support the verdict.

(l)

That the Court committed manifest error affecting the substantial rights of the defendants during the trial of the case that were duly and regularly excepted to by the defendants.

(m)

That the Court committed manifest error affecting the substantial rights of the defendants by refusing to allow defendants, or either of them, to withdraw their respective pleas of not guilty, which said pleas of not guilty were taken at a time when defendants

were not represented by counsel, and permitting defendants, previous to the trial, through their counsel and upon advice of their counsel, to answer, demurrer to or to plead to the Indictment herein.

(n)

That the Court committed manifest error affecting the substantial [197] rights of the defendants at the time that the Government first rested their case, by refusing to permit counsel to argue a motion that the Court instruct the jury to acquit defendants at said time, and by the Court refusing to instruct the jury to acquit the defendants.

(o)

That the Court committed manifest error in refusing to grant defendants' motion for a new trial upon newly discovered evidence, which newly discovered evidence would, had it been presented to the jury, have dissipated the evidence of the witnesses for the Government, relative to the handling of opium in Nogales, Sonora, Mexico, which newly discovered evidence with due diligence could not have been discovered on the part of the defendants prior to the trial or during the course of the trial.

(p)

That the Court committed manifest error in denying defendants' motion for a new trial upon all of the grounds set forth in said motion for a new trial.

(q)

That the Court committed manifest error in denying the motion for a new trial in view of the affidavits in support thereof, which affidavits set forth evidence which would tend to show that one of the defendants,

had had transactions involving handling of opium in a foreign country, and would tend to prove that the transaction of handling opium in a foreign country had not been continued in the United States.

5. That the District Court committed error in giving to the jury the following charges, to wit:

“The Act further provides that whenever on trial for violation of this section, the defendant is charged to have, or to have had possession of such opium or preparation [198] or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain possession to the satisfaction of the jury.”

GEORGE E. PRICE,

GILBERT D. BOALT,

Attorneys for Plaintiffs in Error.

Due service of the within Assignment of Errors by copy hereby admitted this 24 day of December, 1913.

BENJ. L. McKINLEY,

T. H. SELVAGE,

Asst.

[Endorsed]: Filed Dec. 24, 1913. W. B. Maling, Clerk. By C. W. Calbreach, Deputy Clerk. [199]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the Court-room thereof, in the City and County of San Francisco, on Tuesday, the 23d day of December, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

No. 5345.

UNITED STATES

vs.

THOS. ANDREWS and GEORGE POOLE.

Order Fixing Bail Pending Determination Writ of Error.

By the Court ordered that the bail of defendants herein pending the determination of the writ of error herein be, and the same is hereby fixed in the sum of \$5,000, as to each of said defendants. The bond given to be approved by either of the following Hon. W. W. Morrow, Hon. W. C. Van Fleet, Hon. M. T. Dooling, or Francis Krull, U. S. Commissioner. Further ordered that execution of judgment herein be stayed for a further period of two weeks. [200]

Writ of Error—Copy.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Thomas Andrews, *alias* Thomas J. Murphy, and George Poole, *alias* George Moore, plaintiffs in error, and the United States, defendant in error, a manifest error hath happened, to the great damage of the said Thomas Andrews, *alias* Thomas J. Murphy, and George Poole, *alias* George Moore, plaintiffs in error, as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the

24 day of December, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal] W. B. MALING,
Clerk U. S. District Court, Northern District of
California. [201]

By C. W. Calbreath,
Deputy Clerk.

Allowed by:

M. T. DOOLING,
Judge of the District Court.

[Endorsed]: Filed Dec. 24, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [202]

Citation on Appeal—Copy.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United
States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein George Poole and Thomas Murphy are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, this 22d day of June, A. D. 1914.

M. T. DOOLING,
United States District Judge.
Service admitted this 22d June, 1914.

JNO. W. PRESTON,
U. S. Dist. Atty.

[Endorsed]: Filed Jun. 22, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [203]

[Bond for Costs on Writ of Error.]

KNOW ALL MEN BY THESE PRESENTS, That we, Thomas Andrews, *alias* Thomas J. Murphy et als., as principals, and Ambrose B. Dunn & Thomas E. Brophy, as sureties, are held and firmly bound unto the UNITED STATES OF AMERICA in the full and just sum of ONE HUNDRED (\$100.00) DOLLARS, to be paid to the said UNITED STATES OF AMERICA; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of November, in the year of our Lord One Thousand Nine Hundred and Fourteen.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a suit depending in said court, between the UNITED STATES OF AMER-

ICA and Thomas Andrews, *alias* Thomas J. Murphy et als., No. 5345, a judgment of conviction was rendered against the said Thomas Andrews, *alias* Thomas J. Murphy et als., and the said Thomas Andrews, *alias* Thomas J. Murphy et als., having obtained from said court, a Writ of Error to reverse the judgment in the aforesaid suit, and a citation directed to the said UNITED STATES OF AMERICA, citing and admonishing it to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, the condition of the above obligation is such, That if the said Thomas Andrews, *alias* Thomas J. Murphy et als. shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THOMAS MURPHY. (Seal)

AMBROSE B. DUNN. (Seal)

THOMAS E. BROPHY. (Seal)

Acknowledged before me the day and year first above written.

[Seal]

FRANCIS KRULL,
United States Commissioner, North'n Dist of California. [204]

United States of America,
Northern District of California,—ss.

Ambrose B. Dunn and Thomas E. Brophy, being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and is worth the sum of Two Hundred Dollars, exclusive of property

exempt from execution, and over and above all debts and liabilities.

AMBROSE B. DUNN.

THOMAS E. BROPHY.

Subscribed and sworn to before me, this 20th day of November, A. D. 1914.

[Seal]

FRANCIS KRULL,

United States Commissioner, North'n Dist. of California.

Approved:

WALTER E. HETTMAN,

Asst. U. S. Atty.

Approved:

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Nov. 23, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [205]

*In the United States District Court in and for the
Northern District of California, 1st Div.*

UNITED STATES

vs.

THOMAS ANDREWS, *alias* ———, GEORGE
POOLE, *alias* ———, et al.

Bond to Appear on Writ of Error—Thomas Andrews.

KNOW ALL MEN BY THESE PRESENTS:
That I, THOMAS ANDREWS, *alias* Thomas J. Murphy, as principal, and AMBROSE DUNN, 367 Perkins St., Oakland, Cal., and FLETCHER BAKER, 2869 Union St., San Francisco, California,

as sureties, are held and firmly bound unto the UNITED STATES OF AMERICA in the full and just sum of Five Thousand Dollars (\$5,000.00), to be paid to the said UNITED STATES OF AMERICA; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 2d day of January, A. D. 1914.

WHEREAS, at a District Court of the United States for the Northern District of California, in a suit depending in said Court between the UNITED STATES and THOMAS ANDREWS et al., numbered 5345, wherein said THOMAS, ANDREWS was charged in two counts with the crime of conspiracy to import opium into the United States and of the cause of conspiracy to receive, conceal and facilitate the transportation and concealment after importation of opium into the United States and was thereafter brought to trial on said charge before a jury and was found guilty and sentenced to be imprisoned for the term of three years in the State Penitentiary at San Quentin, California, and whereas, after such conviction said Thomas Andrews sued out in the United [206] States Circuit Court of Appeals for the Ninth Circuit a writ of error to said District Court for the Northern District of California, and whereas, by an order made by the Honorable Maurice T. Dooling, Judge of the United States District Court for the Northern District of California, on the 24th day of December, A. D. 1913,

and the said THOMAS ANDREWS has been admitted to bail pending the said determination in said United States Circuit Court of Appeals for the Ninth Circuit of said writ of error, in the sum of Five Thousand Dollars (\$5,000.00) and a Bond for the payment of costs upon said writ of error has been filed in the sum of One Hundred Dollars (\$100.00).

Now, the condition of the above obligation is such that if the said Thomas Andrews, *alias* Thomas Murphy, shall personally appear and render himself in judgment on the final determination in said United States Circuit Court of Appeals for the Ninth Circuit, of said writ of error at and before the said District Court of the United States aforesaid or whenever or wherever he may be required to answer said judgment and all matters and things that may be adjudged against him, *whenever* the same may be prosecuted, and render himself amenable to any and all Court orders and process in the premises and not depart the said District Court and said District without leave first obtained, and if said writ of error shall be dismissed and he shall appear and render himself in execution under the judgment herein, then the above obligation to be void; else to remain in full force and virtue.

THOMAS J. MURPHY.

AMBROSE DUNN.

FLETCHER BAKER.

Taken and acknowledged before me this 2d day of January, 1914.

[Seal]

FRANCIS KRULL. [207]

Northern District of California,—ss.

Ambrose Dunn and Fletcher Baker, each being duly sworn, each for himself deposes and says that he is a householder in said District, and is worth the sum of Five Thousand (\$5,000) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

AMBROSE DUNN.

FLETCHER BAKER.

Subscribed and sworn to before me this 2d day of January, A. D. 1914.

[Seal]

FRANCIS KRULL,

United States Commissioner, for the Northern District of California, at San Francisco.

The form of the foregoing bond and the sufficiency of the sureties thereto is hereby approved.

T. H. SELVAGE,

Asst. United States Attorney.

Approved:

[Seal]

FRANCIS KRULL,

United States Commissioner, Northern District of California.

[Endorsed]: Filed Jan. 2, 1914. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [208]

*In the United States District Court in and for the
Northern District of California.*

No. 5345.

UNITED STATES

vs.

THOMAS ANDREWS, *alias* ———, GEORGE
POOLE, *alias* ———, et al.

Bond to Appear on Writ of Error—George Poole.

KNOW ALL MEN BY THESE PRESENTS:
That I, GEORGE POOLE, *alias* George Moore, as
principal, MARGARET BARRIS, EDWARD
GEORGE SMITH, MRS. MAMIE KOCH, and
FRANK T. BARRIS, as sureties, are held and
firmly bound unto the UNITED STATES OF
AMERICA in the full and just sum of FIVE THOU-
SAND DOLLARS' (\$5,000), to be paid to the said
UNITED STATES OF AMERICA; to which pay-
ment well and truly to be made we bind ourselves,
our heirs, executors and administrators, successors
and assigns, jointly and severally by these presents.

Sealed with our seals dated this 27th day of De-
cember, A. D. 1913.

WHEREAS, at a District Court of the United
States for the Northern District of California, in a
suit depending in said court between the UNITED
STATES and GEORGE POOLE et al., numbered
5345, wherein said GEORGE POOLE was charged
with the crime of conspiracy, to import, receive, con-
ceal and facilitate the transportation and conceal-
ment after importation of opium, and was thereafter

brought to trial on said charge before a jury and was found guilty and sentenced to be imprisoned for the term of three years in the State Penitentiary at San Quentin, California, and whereas, after such conviction said George Poole sued out in the United States Circuit Court of Appeals for the Ninth Circuit a writ of error to said District Court for the Northern District of California, and whereas, [209] by an order made by the Honorable Maurice T. Dooling, Judge of the United States District Court for the Northern District of California, on the 24th day of December, A. D. 1913, the said GEORGE POOLE has been admitted to bail pending the said determination in said United States Circuit Court of Appeals for the Ninth Circuit of said writ of error, in the sum of Five Thousand Dollars (\$5,000) and a Bond for the payment of costs upon said writ of error has been filed in the sum of One Hundred Dollars (\$100.00).

Now, the condition of the above obligation is such that if the said GEORGE POOLE shall personally appear and render himself in judgment on the final determination in said United States Circuit Court of Appeals for the Ninth Circuit, of said writ of error at and before the said District Court of the United States aforesaid or whenever or wherever he may be required to answer said judgment and all matters and things that may be adjudged against him, whenever the same may be prosecuted, and render himself amenable to any and all Court Orders and process in the premises and not depart the said District Court and said District without leave first ob-

tained, and if said writ of error shall be dismissed and he shall appear and render himself in execution under the judgment herein, then the above obligation to be void; else to remain in full force and virtue.

GEO. O. POOLE.

MRS. MARGARET BARRIS.

EDWARD GEORGE SMITH.

MRS. MAMIE KOCH.

FRANK T. BARRIS. [210]

Acknowledged before me the day and year first above written.

[Seal]

FRANCIS KRULL,

United States Commissioner for the Northern District of California, at San Francisco.

Approved:

T. H. SELVAGE.

Assistant United States Attorney.

Approved:

[Seal]

FRANCIS KRULL,

United States Commissioner, Northern District of California.

Northern District of California,—ss.

Margaret Barris, Edward George Smith, Mrs. Mamie Koch and Frank Barris, being duly sworn, each for himself and herself deposes and says, that he is and she is a householder in said District, and is worth the sum of Five Thousand (\$5,000) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

MRS. MARGARET BARRIS.

EDWARD GEORGE SMITH.

MRS. MAMIE KOCH.

FRANK T. BARRIS.

Subscribed and sworn to before me this 27th day of December, A. D. 1913.

[Seal]

FRANCIS KRULL,

United States Commissioner for the Northern District of California, at San Francisco.

[Endorsed]: Filed Dec. 27, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [211]

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and county of San Francisco, in the State of California, on Wednesday, the eighteenth day of November, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2508.

THOMAS ANDREWS et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Order Vacating Order and Judgment of Dismissal
and Reinstating Cause.**

On consideration of the petition of counsel for the plaintiffs in error, filed November 2, 1914, for an order allowing the plaintiffs in error to file in this

court a certified Transcript of the Record on Return to the writ of error heretofore sued out by the plaintiffs in error from this court to the District Court of the United States for the Northern District of California, First Division, in the above-entitled cause, and for an order allowing the plaintiffs in error to docket the cause in this court; and on consideration of the petition of counsel for the plaintiffs in error, filed November 17, 1914, for a rehearing, and on consideration of the affidavits and points and authorities filed, and of the oral arguments made by counsel herein, and good cause therefor appearing:

It is ORDERED that the Order and Judgment of Dismissal under Subdivision 1 of Rule 16 of the Rules of Practice of this Court, made and entered by this court in the above-entitled cause on the second day of November, A. D. 1914, be, and hereby are vacated, and that [212] this cause be, and hereby is reinstated.

I hereby certify that the foregoing is a full, true and correct copy of an original Order made and entered in the within entitled cause.

ATTEST my hand and the Seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this nineteenth day of November, A. D. 1914.

[Seal]

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Endorsed]: Filed Nov. 19, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [213]

At a stated Term, to wit, the October Term, A. D.
1914, of the United States Circuit Court of Ap-
peals for the Ninth Circuit, held in the court-
room thereof, in the City and County of San
Francisco, in the State of California, on Wednes-
day, the eighteenth day of November, in the year
of our Lord one thousand nine hundred and
fourteen. Present: The Honorable WILLIAM
B. GILBERT, Circuit Judge, Presiding; Hon-
orable ERSKINE M. ROSS, Circuit Judge;
Honorable CHARLES E. WOLVERTON, Dis-
trict Judge.

No. 2508.

THOMAS ANDREWS et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Order Allowing Plaintiffs in Error Thirty Days
Within Which to File Certified Transcript of the
Record on Writ of Error, etc.**

On motion of Mr. Bruce Glidden, counsel for the
plaintiffs in error, and good cause therefor appear-
ing, it is ORDERED that the plaintiffs in error be,
and hereby are allowed thirty (30) days from this
date within which to file in this Court a certified
Transcript of the Record on Return on the writ of

error heretofore sued out by the plaintiffs in error from this Court to the District Court of the United States for the Northern District of California, First Division, in the above-entitled cause, and to docket the above-entitled cause on said writ of error in this Court. [214]

I hereby certify that the foregoing is a full, true and correct copy of an original Order made and entered in the within entitled cause.

ATTEST my hand and the Seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this nineteenth day of November, A. D. 1914.

[Seal] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Endorsed]: Filed Nov. 19, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [215]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

I, W. B. Maling, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify that the foregoing 215 pages, numbered from 1 to 215, inclusive, contain a full, true and correct Transcript of certain records and proceedings, in the case of the United States of America vs. Thomas Andrews et al.,

numbered 5345, as the same now remain on file and of record in the office of the Clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with the "Praeceptum" (copy of which is embodied in this Transcript), and the instructions of the attorneys for plaintiffs in error and appellants herein.

I further certify that the costs for preparing and certifying the foregoing Transcript on Writ of Error is the sum of One Hundred Twenty-two Dollars and Ten Cents (\$122.10), and that the same has been paid to me by the attorneys for the appellants herein.

Annexed hereto is the Original Citation on Writ of Error and the Original Writ of Error with the return of the said District Court to said Writ of Error attached thereto.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 10th December, A. D. 1914.

[Seal]

W. B. MALING,
Clerk.

By C. Calbreath,
Deputy Clerk.

[Ten Cents Internal Revenue Stamp. Canceled
Dec. 10, 1914. C. W. C.] [216]

Writ of Error—Original.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to
the Honorable, the Judges of the District Court
of the United States for the Northern District
of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Thomas Andrews, *alias* Thomas J. Murphy, and George Poole, *alias* George Moore, plaintiffs in error, and the United States, defendant in error, a manifest error hath happened, to the great damage of the said Thomas Andrews, *alias* Thomas J. Murphy, and George Poole, *alias* George Moore, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 24 day

of December, in the year of our Lord one thousand nine hundred and thirteen.

[Seal]

W. B. MALING,
Clerk U. S. District Court, Northern District of
California.

By C. W. Calbreath,
Deputy Clerk.

Allowed by:

M. T. DOOLING,

Judge of the District Court. [217]

[Endorsed]: No. 5345. United States Circuit Court of Appeals for the Ninth Circuit. Thomas Andrews, *alias* ———, George Poole, *alias* ——— et al., Plaintiffs in Error, vs. United States, Defendant in Error. Writ of Error. Filed Dec. 24, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [218]

Return to Writ of Error.

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this Writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was

on the 7th day of December, A. D. 1914, duly lodged in the case in this Court for the within named defendants in Error.

By the Court:

[Seal]

W. B. MALING,
Clerk United States District Court, Northern District of California.

By C. W. Calbreath,
Deputy Clerk.

[Ten Cents Internal Revenue Stamp. Canceled
Dec. 10, 1914, C. W. C.] [219]

Citation on Appeal—Original.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein George Poole and Thomas Murphy are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOO-

LING, United States District Judge for the Northern District, California, this 22d day of June, A. D. 1914.

M. T. DOOLING,
United States District Judge. [220]
Service admitted this 22d June, 1914.

JNO. W. PRESTON,
U. S. Dist. Atty.

[Endorsed]: No. 5345. U. S. Circuit Court of Appeals for the Ninth Circuit. Geo. Poole and T. Andrews, Appellants, vs. United States. Citation on Appeal. Filed Jun. 22, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [221]

[Endorsed]: No. 2508. United States Circuit Court of Appeals for the Ninth Circuit. Thomas Andrews, *alias* Thomas J. Murphy, and George Poole, *alias* George Moore, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, First Division.

Filed December 10, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals,

For the Ninth Circuit, District of California

THOMAS ANDREWS, alias THOMAS J.
MURPHY, and GEORGE POOLE, alias
GEORGE MOORE,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF OF PLAINTIFFS IN ERROR.

Wm. F. Rose and

Bruce Glidden,

Attorneys for Plaintiffs in Error

Filed this

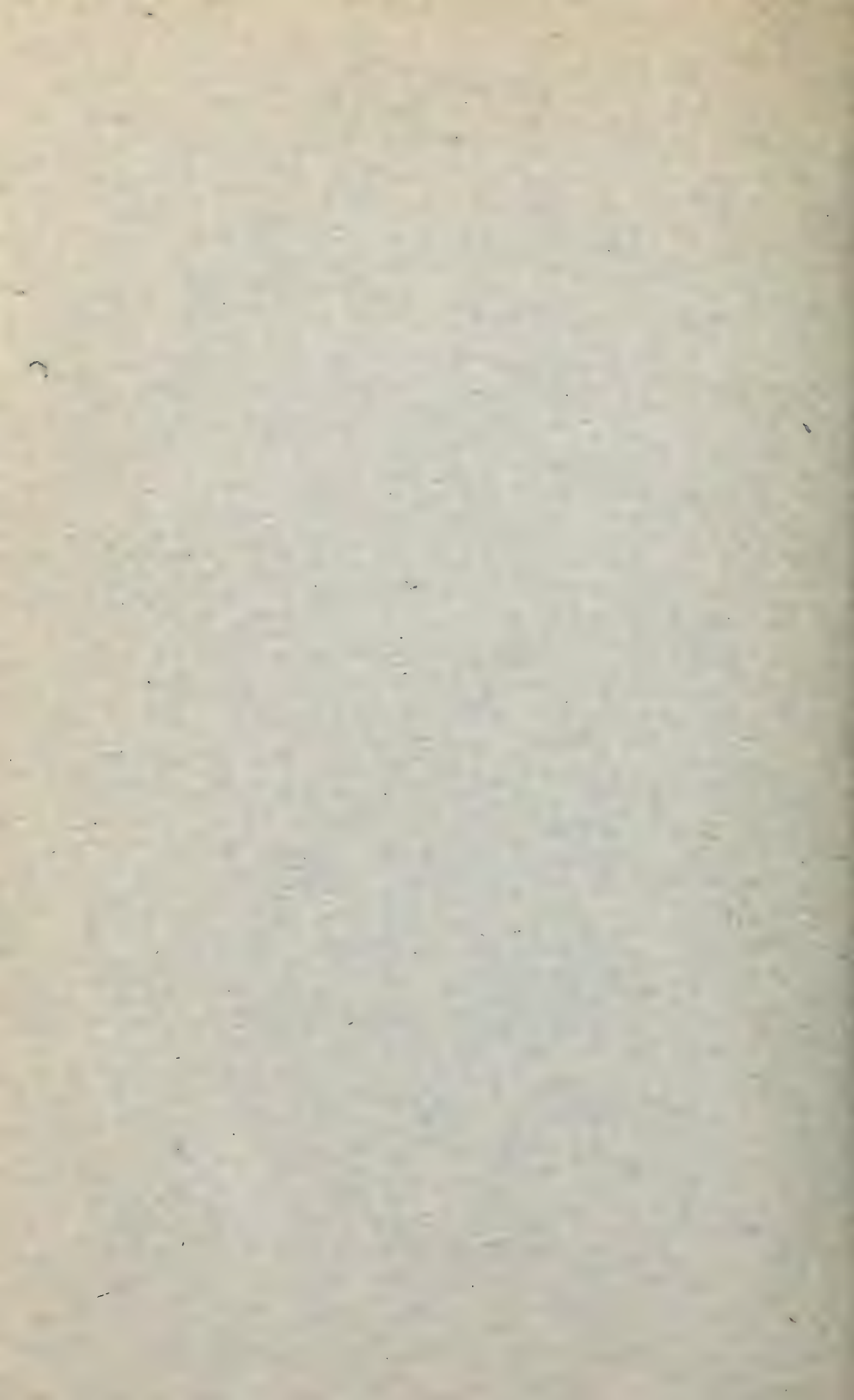
day of March, A. D. 1915

Frank D. Monckton, Clerk

By

Deputy Clerk.

MAH 1 - 1915



United States Circuit Court of Appeals,

For the Ninth Circuit, District of California

THOMAS ANDREWS, alias THOMAS J.
MURPHY, and GEORGE POOLE, alias
GEORGE MOORE,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF OF PLAINTIFFS IN ERROR.

United States Circuit Court of Appeals,

For the Ninth Circuit, District of California

THOMAS ANDREWS, alias THOMAS J.
MURPHY, and GEORGE POOLE, alias
GEORGE MOORE,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF OF PLAINTIFFS IN ERROR.

(a) STATEMENT OF THE CASE

Plaintiffs in Error in this case, together with one Chang Kaw and Charles Benton, were by the United States grand jury indicted in October, 1913, charging that on May 1, 1913 defendants confederated together unlawfully in San Francisco for the purpose of committing a crime against the United States. The indictment charges two distinct and

separate counts. In the first count it is charged that the defendants conspired to commit a crime against the United States, to wit, that of importing opium from Old Mexico into the United States by way of El Paso, Texas, to San Francisco, California. The second count, after alleging in general terms a conspiracy to commit a crime against the United States, charges that the defendants confederated and conspired together for the purpose of unlawfully transporting and concealing contraband opium theretofore unlawfully brought into the United States from Old Mexico by way of El Paso to San Francisco. In both counts of said indictment four identical, distinct and separate overt acts on the part of these defendants are charged in furtherance of the conspiracy alleged in each count. The first overt act charged is the bringing of two trunks from El Paso to San Francisco by way of Trinidad, Colorado; the second is the delivery of smoking opium to Chang Kaw at 30 Waverly Place, San Francisco; the third is the taking of two trunks used by the defendants for smuggling opium from the home of Charles Benton, 1346 A Stevenson Street, San Francisco, and leaving the same with one William Roberts in said city; the fourth is the purchase by Thomas Andrews, alias Murphy, of a certain railroad ticket from Trinidad, Colorado to San Francisco for \$44.20, and also the payment by him of \$17.02 as excess on baggage alleged to have contained contraband opium. In both counts of the indictment the alleged conspiracy shows its inception on May 1, 1913, and that at that time the

defendants conspired, confederated and came together with the intent to commit this offense against the United States, and continuously thereafter and in furtherance thereof the four overt acts mentioned are alleged to have been committed.

Defendants pleaded "not guilty" at the time of their arraignment and at said time were not represented by counsel. On November 22, 1913, after trial the jury found defendants guilty on both counts as charged in said indictment. On December 10, 1913, after motions for new trial and in arrest of judgment were denied by the Court, sentence was imposed as follows: Two years on the first count and one year on the second count, the sentence on the second count to commence after the expiration of the first sentence, a total of three years in San Quentin prison.

On November 2, 1914, this court dismissed plaintiffs' writ of error for failure to properly prosecute the same pursuant to Subdivision 1, Rule 16, of the Rules of Practice of this court. Thereafter, on November 19, 1914, this court set aside its original order and reinstated the cause, on the same day granting thirty days from said date for plaintiffs in error to file and docket a certified transcript of the record. Present counsel were associated and took part in said application for re-hearing on November 19, 1914, and since have been substituted as the sole counsel for the plaintiffs in error in the place and stead of counsel trying the case.

(b) SPECIFICATION OF ERRORS.

Plaintiffs in error have in their assignment of errors (Tr. pp. 233-240) as heretofore filed herein, enumerated the errors which they urge, and which we here re-allege, and we particularly specify and urge as error in this cause the following:

1. That the District Court erred in overruling defendants' motion, made prior to trial, to allow the defendants, these plaintiffs in error, to withdraw their pleas of "not guilty" for the purpose of interposing a demurrer to the indictment herein, which said pleas of not guilty were entered at a time when defendants were not represented by counsel. And it is herein urged that the said indictment is defective and fails to state an offense against the laws of the United States.

2. That the verdict is not supported by the evidence, and said verdict and judgment thereon are contrary to law.

3. That the Court committed manifest error affecting the substantial rights of these defendants during the trial of the case relative to the admission of certain evidence which was duly and regularly excepted to by counsel for defendants.

4. The Court erred in denying defendants' motion that said Court instruct the jury to acquit defendants at the time when the government first rested its case, and in refusing to permit counsel

for defendants to argue to the Court that said instruction be given to acquit on the ground of failure of evidence to prove the charges set forth in the indictment.

5. That the Court erred in instructing the jury as to the law applicable to this case, and as follows:

“The act further provides that whenever on trial for a violation of this section the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain possession to the satisfaction of the Jury.” (Tr. 193)

“If you find that contraband opium was in the possession of the defendants, or either of them, in pursuance of a conspiracy, that fact is sufficient to establish the overt act of having such opium in his possession, unless explained by the defendant.” (Tr. 196).

6. That the said Court committed manifest error affecting the substantial rights of these defendants in denying their motion for a new trial and in arrest of judgment, on the ground of newly discovered evidence, and in the assignment of errors heretofore filed herein the defendants referred to and made a part of said assignment all the records, evidence and proceedings, together with the affidavits filed in said cause.

(c) ARGUMENT.

1. THE INDICTMENT.

The first alleged error on the part of the court below which is here urged is relative to the denial by the said court of defendants' motion to be allowed to interpose a demurrer to the indictment, as said defendants had pleaded "not guilty" before any counsel appeared in their behalf. (Tr. pp. 14-15). It is a well settled rule of law and procedure that the court has discretionary power to pass upon a motion allowing the withdrawal of a plea under the circumstances occurring below, for the purpose of allowing counsel to interpose a demurrer to the indictment, and if that discretionary power has been abused this court can take cognizance thereof. We maintain that the error in refusing this motion was a very material and substantial one, for the reason that the defendants were charged with the commission of a felony, and were about to be tried for the same. The question as to what the particular crime was which the defendants were charged with should have been settled in order that the defendants might have prepared a proper defense and have been allowed to interpose the same. Section 5440, Rev. Stat. is as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more

than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."

We will now proceed with an analysis of the indictment. The first count charges a conspiracy on the part of the defendants with others unknown to bring opium into the United States from Mexico by way of El Paso to San Francisco. (Tr. p. 2). The second count also charges a conspiracy by the same defendants to transport, conceal and sell opium after importation, knowing it to be contraband. (Tr. p. 5). Then follow the identical four overt acts in both counts, and in support and furtherance of the alleged conspiracy charged in both counts. The law relative to importing and dealing in opium is Section 8801, as set forth in the U. S. Compiled Statutes, 1913, and is as follows:

"If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such

opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the

A careful study of the indictment shows that it attempts to set up and charges a violation of Section 5440 aforesaid, and does not charge the offense consistent with the satisfaction of the jury." (35 Stat. 614). —
 comprehended in Section 8801. There is a very great distinction between the two sections, and just here we maintain the error lies both on the part of the prosecution and of the court below. Both counts charge that all agreements to violate the laws of the United States by these defendants, Andrews and Poole, were continuous from and after May 1, 1913; that they had their inception on said date in San Francisco, California. If this be so and the entire offense is a continuing one under said Section 5440, then we maintain that there is but one crime, if any, namely, that of a conspiracy with four alleged overt acts in furtherance thereof. And if this be the true charge, and there be but one conspiracy, how can it be maintained that two counts are permissible, both charging a conspiracy to commit a certain crime, and neither count charges any crime whatsoever under Section 8801. Consequently the indictment is defective and duplicitous.

Again, had there been charged first a conspiracy and four overt acts in furtherance thereof, and the second count set out the direct offense by these defendants of violating Section 8801, there is no question but that the indictment would be proper under

the law. There is no question but that various offenses of a similar nature may be charged in separate counts in one indictment,—for instance, as was held in *U. S. v. Lancaster et al.*, 44 Fed. Rep. 885, in which the rule is announced that counts charging a conspiracy and also the offense committed in pursuance thereof may be joined where both offenses are similar in nature and in mode of trial and punishment. Sec. 1024 of the U. S. Statutes provides as follows:

“When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the Court may order them to be consolidated ”

and is decisive on this question of charging various offenses of similar kind in the same indictment. In the indictment before us, however, if any crime is alleged it is one only, for the gist of the offense, if any, is an alleged felonious agreement and conspiracy made in San Francisco May 1, 1913, and a continuation thereof evidenced by the four overt acts set out.

Again, it is possible under the indictment before us, that practically two conspiracies are alleged, and in furtherance of each one the identical four overt acts are charged and proof introduced in-

discriminately in support of both charges set forth in the two counts, and not only that, but the sentence is imposed after a verdict of guilty is found, and by a cumulation of punishment three years' sentence is imposed on these plaintiffs in error, when the conspiracy statute itself provides a sentence of but two years, and no more. We will advert to this fact later in our brief.

Therefore, for the reasons hereinbefore set forth, we maintain the indictment is defective, and that this warrants a reversal of the case by this Court.

2. EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT.

A conspiracy may be defined broadly as a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means.

Commonwealth v. Hunt, 4 Metc. (Mass) III;
38 Am. Dec. 346;
U. S. v. Wooten, 29 Fed. 702;
Hedderly v. U. S., 193 Fed. 567;

In order to convict on the charge of conspiracy there must be shown:

1. That a conspiracy existed as charged in the indictment.
2. That if such conspiracy existed, the overt act charged was committed in furtherance of

such conspiracy.

3. That the defendant was one of the conspirators.

U. S. v. Cassidy, 67 Fed. 702;

U. S. v. Newton, 52 Fed. 280;

In discussing the crime of conspiracy the Court says in *Dealey v. U. S.*, 152 U. S. 547:

"This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy merely affords a locus penitentiae so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute."

It is maintained by plaintiffs in error that there is absolutely no evidence anywhere in the record showing that either Murphy or Poole were in San Francisco on May 1, 1913, or at any time during the month of May 1913, or that they ever at any time or place conspired together to import contraband opium. There is some evidence that Andrews, alias Murphy, was in Oakland June 20, 1913 (Tr. p. 146), but nothing is shown as to Poole being here or that there ever was a plan by these two with one another or with any other persons to import opium. The evidence shows that Poole received certain cases in Nogales, Mexico (Tr. pp. 72, 78), but it is also shown in the affidavit of George G. Sauer on motion for new trial (Tr. pp. 210-211), that the cases referred to were taken into the interior of Mexico

pursuant to instructions. There is no question in our minds but that the inference left with the jury at the time of the trial and when this evidence was introduced through the witness Manzo, was, that the alleged opium supposed to have been transported by Murphy from Trinidad to San Francisco was the same alleged to have been in the cases in Old Mexico. There is absolutely no evidence at any time shown in this case that the alleged, or any opium, ever was imported or carried across the line from Mexico, and the only cases alleged to have contained opium mentioned in the evidence are conclusively shown to have been sent from Nogales, Mexico, to the interior to Cananea.

There is no evidence, nor a scintilla of evidence, that either Murphy or Poole was in San Francisco in May 1913, and there is no proof nor any evidence of the fact of importation of opium; therefore, how can it be said that these defendants were guilty of a conspiracy to import opium and to traffic in the same in the United States, and particularly in San Francisco? There is no question but that there must be at least two elements to make out this crime of conspiracy: there must be the confederation or conspiring and there must also be the overt act. Now, under the first count the overt act charged is the bringing of opium into the United States from Mexico. And we maintain that there must be proof that there was an overt act in furtherance of and to carry into effect the object of the conspiracy. It requires more than proof of mere passive cognizance of a crime on the part of a de-

fendant to sustain a charge of conspiracy to commit it, and the jury must find that such prisoner did some act or made some agreement showing an intention to participate in some way in such conspiracy.

U. S. v. Howell, 56 Fed. 33;

Bannon v. U. S., 156 U. S. 464;

U. S. v. Barrett, 65 Fed. 62.

Can it reasonably be said in this case from the evidence adduced during the trial that there was any agreement between these two defendants at any time or place, and particularly during the month of May 1913, when the evidence shows that the first time either of these defendants was in or near San Francisco after May 1, 1913, is on June 20, 1913, when Murphy registered under the name of "Spencer" at the Hotel Crellin, in Oakland? (Tr. p. 146). Further, assuming, for the purpose of the argument, that the defendants were guilty of the crime of conspiring together to unlawfully import opium, could the penalty under the indictment be more than two years? It is shown in the judgment on verdict of guilty filed in this case on December 10, 1913, (Tr. p. 229), that the defendants were duly convicted of the crime of CONSPIRACY to import, receive and conceal opium.

As a resume' for the benefit of this Court and for the purpose of arranging in a comprehensive and systematic manner the evidence adduced by the government on the trial of this case, we herein show what witnesses were introduced, the evidence

of each that affected the defendant Andrews; that which affected Poole; and that which affected both. The pages of the transcript on which said evidence is found are as follows:

Evidence affecting Thomas Andrews:

Harry F. Walsh,

	Tr. page
Direct Examination	15
Cross	27
Redirect	28

Joseph Head,

Direct	28
Cross	44
Redirect	50
Recross	52
(Recalled)	97
Redirect	102
(Recalled)	113

Fred West,

Direct	55
Cross	56
Redirect	63
(Recalled)	134
Cross	135

John H. Dawson,

Direct	68
Cross	69

Chas. R. Miller,

Direct	91
Cross	94
Redirect	96

George Cassidy,

Direct	104
Cross	106

	Tr.	page
Marie Nelson,		
Direct	.	107
Cross	.	110
Dash Katona,		
Direct	.	145
Willian Roberts,		
Direct	.	165
Cross	.	167
Martin Baker,		
Direct	.	168
Cross	.	170
Redirect	.	170
Evidence affecting George Poole:		
Raphael Manzo,		
Direct Examination		71
(Recalled)	.	136
Cross	.	137
Guillermo McAlpine,		
Direct	.	77
J. E. Benton,		
Direct	.	85
Cross	.	90
G. R. Smalley,		
Direct	.	154
Louise Lorraine,		
Direct	.	156
John W. Smith,		
Direct	.	157
Cross	.	160
P. O. Huffaker,		
Direct	.	171

	Tr. page
Evidence affecting both defendants:	
Charles W. Dixon,	
Direct . . .	102
Cross . . .	104
Louis Sang,	
Direct . . .	116
Cross . . .	124
R. H. McCormick,	
Direct . . .	139
Cross . . .	143
(Recalled) . . .	147
Maud Fay,	
Direct . . .	148
Cross . . .	150
John T. Stone,	
Direct . . .	163

As we have hereinbefore stated, Andrews, alias Murphy, is shown to have been at the Hotel Crellin, Oakland, June 20, 1913. It may also be gathered from certain circumstantial evidence adduced during the trial that he came from Trinidad to San Francisco in September 1913. There is no proof that he had contraband opium in his baggage. The only evidence found is that certain stains analyzed as opium were found in his trunks.

But the error we urge in this portion of our argument is that there is no evidence adduced by the witnesses Manzo and McAlpine that the alleged cases of opium delivered by them to Poole were ever

brought into the United States; on the contrary, their testimony is that they do not know what became of the cases.

In Transcript, on page 76, we find the following testimony:

Mr. PRICE. Q. Just one question. What finally became of these cases you testified to as having been turned over to you?

A. I don't know. ,

Again, the evidence of witness Guillermo McAlpine (Tr. p. 79) shows that certain cases were receipted for by Poole, and thereafter the following question, and answer was elicited (Tr. p. 83):

Mr. SELVAGE. Q. Do you know where these cases went to after they left your bank?

A. No, I do not know.

These two witnesses are the only ones adduced by the government to produce evidence in support of the first count of the indictment so far as the charge of importing opium is concerned, and this is the gravamen of the conspiracy charged in said first count. With this evidence before them, is it unreasonable to suppose that the jury, knowing that Poole received certain cases in Mexico presumably containing opium, asumed that he brought the same into the United States, and then that Murphy brought the same to San Francisco? We maintain, however, that while this may be a conjecture, nevertheless, taken with the instructions given to the jury by the court relative to the possession of opium or alleged opium in possession of a defendant unexplained was a presumption of guilt, and we assert

that it may be reasonably believed that the jury had as a result of the uniting of these two factors, a resulting conviction in their minds of the guilt of defendants, and that such conviction was erroneously conceived by said jury. There is absolutely no connection made with Murphy as to these cases turned over to Poole in Mexico, and on the motion for a new trial, as we have already in our argument stated, the affidavit of George G. Sauer heretofore mentioned conclusively proves, in our opinion, that these particular cases were sent to Cananea, Mexico, by Poole. However, we maintain that once this idea is fastened in the mind of the jury that the cases alleged to contain opium in Mexico were brought into the United States, and then certain stains found in Murphy's trunks, together with all the remaining circumstances adduced by the government in this case and the application of evidence adduced indiscriminately during the trial and over the objection of defendant's counsel and otherwise, could produce but one result, viz., that of the guilt of these defendants on both counts. Our objection goes to the root of the entire case, namely, the overt act of importing these particular cases received by Poole in Mexico, pursuant to a conspiracy on the part of these defendants; but if it is not shown by any evidence that those cases ever crossed over into the United States, how can there be any possible chance be a lawful conviction on the first count? Further, if this particular proof is not made of importing opium and bringing the same across the

line into the United States from Mexico, then all the evidence introduced as to the acts of Murphy, or Andrews, and all the evidence tending to connect these particular defendants with the supposed opium alleged to have been delivered to Poole in Nogales, Mexico, is not connected up, then we maintain there is no ground upon which there can be a conviction predicated upon the verdict brought in by the jury, and particularly when we apply the test under the three particular specifications under this Section 2 originally set out. The verdict is not supported by the evidence and is contrary to law.

4. ERRORS OF THE COURT IN ADMITTING AND REJECTING EVIDENCE DULY EXCEPTED TO.

In our assignment on this ground of alleged error on the part of the Court below we now set out the particular testimony and the refusal by the Court to strike out any of the same, and as is shown, commencing on page 115 of the transcript; the first testimony being that of Mr. Head, Inspector in the service of the United States Government. It was sought by his evidence to introduce certain documentary evidence purporting to have been written by Murphy, and the following testimony was introduced (Tr. p. 114):

Q. (Being cross examination conducted by Mr. Price) Then you do not say positively that this is Mr. Murphy's handwriting, or this is Mr. Murphy's handwriting; you simply state there is a general similarity; is that what you mean to say?

A. Well, I express it a little stronger; there is a marked similarity, marked characteristics.

Q. And you base that simply upon these bits of stuff you picked up; is that correct?

A. Yes, sir. (Tr. p. 115).

Q. The stuff you have concluded to be in Mr. Murphy's handwriting?

A. Yes, sir.

Q. You base that then upon statements of the conclusion which you have come to; is not that correct?

A. Yes, I make the statement on the conclusions I have arrived at after looking at these different samples of the writing.

Q. Have you ever seen Mr. Murphy sign his name?

A. No, sir.

Mr. SELVAGE. I offer these in evidence and ask to submit them to the jury to examine them and to note the characteristics of the handwriting.

Mr. CAMPBELL. If your Honor please, we object to the introduction of these matters at this time upon the ground that it is immaterial, irrelevant and incompetent, and that so far there has been no foundation laid for them and that the corpus delicti of this charge laid in the information has not been established.

Mr. DANFORD. And the witness admits he never saw the handwriting of Murphy.

The WITNESS. No, sir, I take exception to that.

The COURT. He said he never saw him write.

The WITNESS. Yes, your Honor, that is it.

The COURT. The witness who left the stand (Tr. p. 116) testified that Murphy

wrote his name in the register, "Spencer."

Mr. DANFORD. Then that would be the witness to put this in under, if at all. This witness does not know the handwriting, of his own knowledge.

The COURT. No, of course he does not.

Mr. DANFORD. We submit then that the foundation is not laid.

The COURT. Sure the foundation is laid because the witness has testified that he compared this writing with the writing in dispute and gives his opinion as to whether or not it is written by the defendant. The objection is overruled.

Mr. DANFORD. Very well, your Honor.

Mr. SELVAGE. I will submit the signature on the ticket and the name "Juarez" in the book, on this page, the capital J's.

Again, (Tr. p. 118) in the testimony of Louis Sang, the prosecution was attempting to introduce certain correspondence received by Sang from one Walker, who was identified by Sang as being Murphy, or Andrews. The testimony at this point is as follows:

Mr. CAMPBELL. If your Honor please, I desire to interpose the same objection to these letters being read to the jury at this time or introduced in evidence upon the ground that they are immaterial, irrelevant and incompetent and that the proper foundation has not been laid, and that the corpus delicti has not yet been established.

The COURT. The objection is overruled.

Mr. DANFORD. We note an exception.

Further on on the same page, after discussion of a letter, the evidence follows:

The COURT. You had better learn it. The letter which he says was received from the defendant Murphy under the name of Walker may be admitted in evidence.

The COURT. This letter was received from Walker. Let me see it. Is there anything in it bearing on this case? Oh yes, read it.

Mr. SELVAGE. It reads: (Tr. p.119):

“El Paso, Texas, May 19, '13.

Friend Louie: Your friend Fong Chin in Juarez spoke to me in regard to a letter he received stating that you want to see either George or myself about handling some goods for you out of Guaymas, Mexico by boat. Things are in bad shape around Guaymas as there is no goods coming out of there by railroad and your boat route may be O. K. The railroads are all tied up south of Chihuahua City and there has not been any shipments of goods in Juarez for about three weeks. I just returned from a stop in New York City, and George has left. Before I arrived he left. He left word he would be back in about a week, so if you still want to go through with that proposition let me hear from you at your earliest convenience and I will come to San Francisco and talk the matter over. I am,

Very truly,

Tom.”

Address, Thomas Walker, Texas, 210½ Broadway, El Paso.

Mr. DANFORD. (Tr. p. 120) Now, if your Honor please, I move to strike out the reply as to what this business referred to. He answered “opium.” I move to strike that out upon the ground that there is no foundation laid and nothing to show in the instrument itself, which would be the best

evidence of that it would refer to.

The COURT. It does not show, and therefore the failure to show may be supplied by parol proof, which is done here by saying he referred to opium as the goods he desired to have handled. The motion will be denied.

Mr. DANFORD. Exception.

Testimony of John W. Smith, a witness for the prosecution, (Transcript p. 159):

Mr. SELVAGE. Q. State whether or not you have had possession of a memorandum-book, a small red memorandum-book, or a black one, rather.

A. Yes, sir.

Q. Where did you get it?

A. I got it in the drawer of room 22, at the Alcazar Hotel, which was occupied by Mr. Poole.

Q. State whether or not there are any addresses in that book.

A. There is an address there of 30 Waverly Place; there is also another address, 112 East Washington Street, Stockton, which is the Foo Lung address, of which Louis Sang was the manager.

Mr. PRICE. We object to that, your Honor. The witness is called to read an address from a book and he is now making a statement entirely aside from that. We ask that that go out.

Mr. SELVAGE. I want to know who these people are, if he knows, and he has answered.

The COURT. The motion will be denied.

Testimony of Mr. P. O. Huffaker, on behalf of the prosecution (Transcript p. 173):

Mr. PRICE. We object to anything being

admitted in evidence not connected with the defendants and not connected with the corpus delicti in this case.

The COURT. The objection is overruled.

Mr. PRICE. We note an exception.

We advert now again to our argument on the point concerning the importation of those certain cases alleged to have contained opium which it was shown were turned over to Poole in Nogales, Mexico, and we argue that if there is no connection shown on the part of these defendants with the actual importation of these particular cases across the line into the United States in furtherance of a conspiracy between these defendants, then all of the evidence which we have here set out and which was excepted to and the introduction of which was excepted to by counsel for defendants during the trial, should be entirely stricken out, and if the same is stricken out, then we maintain there is no evidence on which to convict the defendants in this case, on either count.

4. REFUSAL BY COURT TO INSTRUCT JURY TO ACQUIT.

The indictment charges in both counts that a conspiracy existed between these defendants. The presumption at the commencement of trial is, that defendants are innocent. The prosecution must establish its case against the accused. The evidence must be conclusive in order to convict. The gravamen of the crime charged is the conspiracy, and it must be proven that opium was brought into the United States in furtherance thereof in order to support the first count of the indictment herein. It

must be shown that the alleged opium at Nogales, Mexico, was brought into the United States by these defendants. If no proof of this fact exists, and we assert there is none, then the jury should have been charged that so far as the first count is concerned there was no proof of conspiracy to import opium. As to the motion made by counsel to instruct the jury to acquit in view of the foregoing, particularly as to the first count, there is a substantial and manifest error on the part of the court below and an abuse of its discretionary power. The power of this court exists to examine the evidence to ascertain if there is any evidence to support the verdict. If none exists, it follows as a corollary that there was abuse of discretion on the part of the court below in refusing to instruct the jury to acquit. The rule covering this particular question has been discussed in *Hedderly v. U. S.*, 193 Fed. Rep. 571. In this case the court in its opinion cites *Wiborg v. the United States*, 163 U. S. 658, relative to the examination of evidence in a case and the extent to which this court or an appellate court will go in examining evidence. In this case the court says:

“No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to

defendants, we feel ourselves at liberty to correct it."

There is no evidence that the alleged opium from Nogales was imported into the United States, as we have already fully discussed. We insist further that the conspiracy and the overt act must be alleged and proven.

Bannon v. U. S., 156 U. S. 464;
U. S. v. Howell, 56 Fed. 21;
Pettibone v. U. S., 148 U. S. 197, 202.

"Where an indictment under Revised Statutes Sec. 5440 for a conspiracy to commit the offense created by Section 10 of the Interstate Commerce Law as amended by Act March 2, 1889, charges a conspiracy between lumber merchants and their servants and an employee of a railroad company to procure less than the established rates by falsely weighing the lumber shipped, such weighing being done by the railroad employe, the jury, in order to convict must find an agreement between two or more of defendants for the purpose named, and also as an overt act, the actual false weighing of lumber by such employe."

U. S. v. Howell, 56 Fed. 21.

Applying the theory of the foregoing citation to the case before us, in discussing this particular question, there is no evidence that such an agreement between the defendants did exist. If such agreement did exist, the overt act consisted in bringing opium from Mexico to the United States, and we must conclude that the jury believed that the opium at Nogales eventually came into the United States, and was the same represented by the stains

found in the trunks of one of these defendants.

There is another aspect of this matter we might discuss concerning the evidence in this case, and relative to the point under discussion, and we now touch upon the question of a variance between the charges in the indictment and proof to sustain such charges.

“Where the indictment charged a conspiracy to defraud one R. H., a married woman, of a certain promissory note, proof that the note was the property of the husband and not of the wife was fatally variant.”

Commonwealth v. Manley, 29 Mass. 173.

If there was an overt act it must have centered around the cases alleged to have contained opium at Nogales, and we must conclude that the jury did decide that said cases at Nogales contained the opium referred to in the indictment, the importing and concealing of which constituted the overt act. If so, and we see no other hypothesis on which the jury predicated its verdict, then under the theory suggested in the decision just quoted the variance was fatal. Counsel for defendants were precluded from arguing to the court that there was a variance when the court refused to allow argument on the motion to acquit, and therefore we here urge reversible error.

When during the trial the question was raised as to what the defendants were obliged to defend against in the way of meeting the charges in the indictment, the court intimates that the only defense to be interposed was to defend from El Paso, Trin-

idad, or some other point of that sort(Tr. p. 73. Therefore, if there was no evidence before the jury relative to the proof of the consummation of the alleged conspiracy charged in the first count of the indictment to import opium from Mexico, and further, if there is a variance between the charges of the indictment and the proof with testimony indiscriminately presented as to all the charges in both counts without any clearly defined application as to either one count or the other, then the court committed manifest error in refusing to allow the matter to be argued as to whether or not an instruction should be given to the jury to acquit.

“Where there is not sufficient evidence against a prisoner he is entitled to a verdict of acquittal should he demand it.”

Bishop's New Criminal Procedure, (1913)
Vol. 2, Sec. 820.

5. ERROR OF THE COURT IN INSTRUCTIONS TO THE JURY.

We quote from the charge to the Jury given by the Court below:

“The Act further provides, that whenever on trial for a violation of this section the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain possession to the satisfaction of the jury.” (Tr. pp. 193, 240).

And again, page 196 of the transcript:

“If you find that contraband opium was in the possession of the defendants or either of them, in pursuance of a conspiracy, that fact is sufficient to establish the overt act of having such opium in his possession unless explained by the defendant.”

Under the circumstances these instructions given by the court below to the jury are sufficient in themselves to warrant a reversal of this case. The charge in the indictment is a conspiracy, as we have already fully argued. And as we have already stated in our argument, it evidently was the theory of the government in trying this case from the very beginning in the preparation of the indictment, and in the introduction of testimony indiscriminately on both counts of the indictment, that they were laboring under the opinion that the defendants were being tried for the crime of conspiracy to import opium and also for the crime of unlawfully transporting, concealing and selling opium. This impression seems also to have communicated itself to the court, as is evidenced by these particular instructions given to the jury. And it can be readily seen that where the evidence shows so clearly that evidently certain cases, containing opium were delivered to Poole, one of the defendants, in Nogales, Mexico, and the defendant Poole not explaining the possession of the same or what was done with the same, the natural inference would be that this opium crossed the line into the United States, was taken from El Paso by Murphy, or Andrews, as he

is known, by way of Trinidad to San Francisco. And we maintain that it is a most serious error on the part of the court to instruct this jury that unless these defendants explain the possession of opium, or alleged opium, in a satisfactory manner, that it is a presumption that they are guilty as charged in the indictment. There is no question in our mind but what had there been two particular counts alleged, one for the conspiracy and one for transporting, handling and dealing in contraband opium, that the charge herein referred to and set out as given by the court to the jury might have been a proper one. But we maintain that having been given in the manner, under the circumstances, and relative to the law as it is supposed to be, and without reference to a close and careful analysis of the indictment in this case, that this one particular point is sufficient for a reversal in itself.

6. ERROR OF COURT IN DENYING MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT.

In our final specifications of error on the part of the court below, we desire to draw the attention of this court to the following portions of the transcript:

Notice of motion for a new trial (Tr. pp. 207-209);

Affidavit of George G. Sauer (Tr. pp. 210-212);

Affidavit of Paulino Fontes (Tr. pp. 212-213);

Affidavit of Louise Lorraine (Tr. pp. 216-217);

Motion in arrest of judgment (Tr. pp. 222-226);

Minutes of Court (Tr. p. 227);

Exception to the ruling of the Court (Tr. p. 227).

We have heretofore in our brief discussed various errors assigned and urged, and will not again traverse the grounds already covered, nor will we burden this court with unnecessary prolixity of argument. The motion for a new trial is based principally on the affidavits cited. The two of Sauer and Fontes respectively indicate the probability of the defendants being able to introduce these two witnesses in their behalf, should an opportunity be presented to do so. The question first arises, was this testimony available and could it have been obtained with reasonable diligence on the part of the defendants at the time of their trial, and is it sufficient to produce probable proof sufficiently strong to in any way change the result of the verdict of the jury. We realize that unless this be so, the proposed evidence of these two witnesses is of no value. We take the view that it would materially affect the case, for the first count charges the conspiracy to import opium, and if the alleged opium at Nogales turned over to Poole was taken to Cananea and by Poole disposed of there, then there is absolutely no question that all subsequent evidence predicated upon the fact that these particular cases contained opium and that the said opium was brought into the United States is irrelevant and incompetent, and

there should be an opportunity given to instruct a jury on this point. Can it be said that they would still find after an instruction in this regard that the defendants were guilty on the first count, or at all, of the commission of the crime they have been charged with in the indictment? Upon this hypothesis, together with the instructions of the court, which we claim were erroneously given and heretofore by us discussed, should not the court have granted the defendants a new trial on motion made by counsel for defendants upon the grounds specified and when supported by these particular affidavits? We respectfully suggest that a new trial should have been granted.

There is also the testimony of Louis Sang (Tr. pp. 116, 124, 173). On examination of this witness Sang in behalf of defendants it appears that prior to his taking the witness stand he is alleged to have stated to Mr. Price, one of the attorneys for defendants, that his dealings with the said defendants were in 1900. A very serious question arises in our minds as to the truthfulness of this particular witness, and the query naturally arises, did he tell the truth, and if he testified falsely in one respect, was he not testifying falsely in other respects?

We believe that the consideration should be given to this particular point of our argument relative to his reliability and the probable effect and influence of his testimony on the jury.

These points which we have raised herein and our own conclusions after a careful study of the case, incline us to assume that there is such manifest error affecting the substantial rights of said defendants, that the Court below should have granted a new trial. In conclusion we believe that the errors we have indicated are of such a nature that each, every and all of them are reversible errors, and that under the circumstances of this case, its serious nature, the indictment, evidence introduced, rulings of the Court, its charge to the jury, verdict, judgment and sentence, are such, that in fairness to the defendants, plaintiffs in error, there should be a reversal by this Court in this case.

Respectfully submitted,

WM. F. ROSE and BRUCE GLIDDEN,
Attorneys for Plaintiffs
in Error.

No. 2508

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS ANDREWS, alias Thomas J.
Murphy, and GEORGE POOLE, alias
George Moore,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN W. PRESTON,

United States Attorney,

Attorney for Defendant in Error.

Filed this.....day of March, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The statement of facts on pages 2, 3, and 4 of the brief of plaintiffs in error is fairly accurate, and a further statement at length here would be unnecessary to the discussion of the law points urged.

ALLEGED DUPLICITY IN INDICTMENT.

Ignoring the defense that the advantage was not taken of the alleged duplicity in the indictment by demurrer, general or special or by motion, and also

without pausing to dwell upon the fact that permission to withdraw a plea in order to interpose a dilatory pleading or motion is a discretionary matter, we pass with confidence to the merits of the point urged.

It is claimed in substance that a conspiracy to unlawfully import opium can not co-exist with a conspiracy to receive and conceal after unlawful importation, and this is particularly true it is claimed, when the overt acts are the same.

It seems that a statement of the matter is sufficient for its refutation. It can not be denied:

1st. That importation is made a crime.

2nd. That receiving and concealing after importation, with knowledge of unlawful importation, is likewise a crime.

(Act of February 9, 1909.)

3rd. It is also plain and undisputed that a conspiracy to commit an offense is likewise an offense.

4th. It is certainly a fact that the two offenses are kindred and such as could be pleaded in separate counts in same indictment as required by Revised Statutes, section 1024.

Conceding the above, where is the duplicity?

What valid objection can be urged to testimony that would be admissible in proof of both offenses?

Why may not a person at the same time and place conspire to commit two crimes?

What valid objection can there be that the crimes are so closely related that proof of a conspiracy to commit one is proof also of a conspiracy to commit the other, or that the overt acts charged in one, are identical with the overt acts charged in the other?

If the overt acts are the same and the time and place of conspiracy the same, the only legitimate conclusion is that the counts are properly united and certainly duplicity is not to be inferred from this happy coincidence.

Counsel seems also to concede that if conspiracy to commit the one is coupled with the substantive charge as to the other it is a proper pleading. If this be true, why does he not thus concede the whole matter?

Section 37 of the Federal Penal Code is as follows:

“Section 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.”

The opium statute of February 9, 1909, section 2 thereof, as it then existed, reads as follows:

“Sec. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell,

or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited, and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

Section 1024 of the Revised Statutes reads as follows:

"Sec. 1024. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

Conspiracy to commit an offense is denounced as a separate offense.

Clune v. United States, 159 U. S. 590; 40 L. Ed. 269.

So true is the above that a higher punishment may be imposed for the conspiracy than for the principal offense.

In *McGregor v. United States*, 134 Fed. 188, an indictment in fourteen counts is considered. The first two counts were conspiracies and the remainder were not. The two conspiracies covered practically, if not indentially, the same time, and all the overt acts, fourteen in number, of the first count, were made overt acts of the second count. The court in this case say at page 194:

“The motion to quash the indictment for alleged duplicity is based on the fact that some of the counts charged that the defendants conspired to defraud the United States, and that other of the counts charged that the defendants, being officers and agents, or officers and clerks, violated sections 1781-1782 of the Revised Statutes by receiving money from their alleged co-conspirator, Smith, for procuring, or aiding to procure, a contract mentioned in the counts relating to the conspiracy. All of the offenses alleged in the different counts of the indictment were for acts connected together and bearing directly upon the conspiracy charged in the indictment, and consequently, under section 1024 of the Revised Statutes (U. S. Comp. St. 1901, p. 720), should have been united in the same indictment. *Logan v. United States*, 144 U. S. 263, 295, 12 Sup. Ct. 617, 36 L. Ed. 429.

“The action of the court below in refusing to require the United States to elect under which counts of the indictment the trial should proceed was without error. The offenses charged were, as has been shown, directly connected together, and it was quite apparent to

the trial judge that any evidence offered to sustain one count was also admissible and relevant to the other counts of the indictment. Such motions are addressed to the discretion of the court, and are not reviewable on writ of error. *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; *Pierce v. United States*, 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454."

INSTRUCTIONS.

Plaintiffs in error urge as the fifth ground for reversal the quotation from the charge of the court reciting the provisions of the opium act (Tr. pp. 193-240).

A portion of the charge not excepted to nor contained in the assignment of errors is also set out in the brief, which is as follows:

"If you find that contraband opium was in the possession of the defendants or either of them, in pursuance of a conspiracy, that fact is sufficient to establish the overt act of having such opium in his possession unless explained by the defendant."

Now assuming that it is proper to consider both quotations, we are unable to see where the legitimate ground for criticism arises. The expression is certainly harmless; the overt act in each is that opium was transported in furtherance of the conspiracy, from El Paso, via Trinidad, Colorado, to San Francisco. Now, if opium was so found in the possession of defendants, it would certainly be proper for the court to say that such evidence is

sufficient proof of the overt act, and the further expression as follows:

“The act further provides that whenever on trial for a violation of this section the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain possession to the satisfaction of the jury” (Tr. p. 193)

adds nothing to the case one way or the other. The recitation of a portion of the opium act was certainly proper and if not proper, certainly is harmless.

The law specially provides that on a trial for a violation of this section (importing, also concealing, etc.) possession is *prima facie* evidence of guilt.

Now, if it is *prima facie* evidence when on trial for the substantive offense, why should it not be *prima facie* evidence when conspiracy to commit the offense is the charge? Or, to state it differently, does it militate against a conspiracy charge to prove that conspiracy was in fact fully executed?

INSUFFICIENCY OF THE EVIDENCE.

In order that the length of the sentence be not considered for any purpose, it must be borne in mind that at the time these defendants were sentenced, it was admitted that these defendants had

each been previously convicted of smuggling opium (Tr. p. 204).

Taking up the evidence of defendants first, it will be noted that no explanation of the Government's testimony was offered or attempted. It will also be noted that the defendants themselves proved that George Poole, alias Moore, had been selling opium to witness Louie Sang, and that these operations began as early as 1909 and the last completed transaction was in about February, 1913 (Tr. p. 174). It is true that an attempt was made to impeach the statement of witness on the question of dates, but little comfort can be gained by defendants so long as it is admitted that the said defendant had at some time engaged in opium transaction with witness. Defendants also proved by the same witness (Tr. p. 174) that on the promise of Poole to buy him twelve cans, he had sent him in March, 1913, the sum of \$300.00. This transaction is amplified in direct testimony of witness (Tr. pp. 116 to 124) wherein this same witness himself makes out a complete case of conspiracy, by testifying that for three or four years he had bought opium of both defendants and that from defendant Murphy, under the assumed name of Tom Walker, he received the letter shown on page 119 of the transcript which relates to importation and concealment of opium, and the George referred to therein is the defendant Poole.

The witness was to be known as George Sandees, and further, as heretofore pointed out, this witness

wired to defendant Poole at El Paso, Texas, through San Joaquin Valley Bank, two remittances for opium, one of \$300 and one of \$100. This letter suggests ways and means and promises a visit for the purpose of perfecting plans for carrying out the scheme. Note also the familiar terms upon which writer and witness are, and also the familiar references to witness about George, showing that witness was familiar with both defendants and also their business.

It seems to me that little, if any, further evidence should be sought for to prove the conspiracy itself. And if any of the overt acts are proved, this scheme would be in my opinion a clear case of conspiracy. But we have much more. We have these defendants, both living at and haunting El Paso and Juarez, Mexico, which places are separated only by the limits of the Rio Grande river (Tr. pp. 181, 186-187). We also find Poole getting from the bank at Nogales, Mexico, four cases of the value of \$1000 each, of a substance known as "Amapol", which witnesses say was the name opium was known as in Mexico.

I submit that enough appears to warrant a jury in believing that this defendant was at that time about to import this opium into the United States. But whether this be sufficient, it is certainly corroborative to the other evidence that there was a conspiracy between the defendants to import and conceal opium (Tr. pp. 71-77, 136-7).

Again, the evidence is without doubt that both defendants were in San Francisco in July, 1913. Witness R. H. McCormick saw them together and also with a woman at Hotel Porter, 91 Turk Street, in July, 1913 (Tr. pp. 139-143).

In June, 1913, ^{Murphy} ~~Poole~~ was at Hotel Crellin, Oakland, under the assumed name of A. J. Spencer (Tr. p. 145) and prior to this time, to wit, on February 17, 1913, and November 18, 1912, he was likewise at this hotel under ^{same} ~~same~~ false name (Tr. pp. 145-6). Sunday, September 6, 1913, Poole registered at Hotel Porter (Tr. p. 147).

Both defendants were together in San Francisco in June, 1913, and were seen together by witness Maud Fay, at a restaurant, on the street, and in the Hotel Porter (Tr. p. 148).

On September 11, 1913, witness Marie Nelson saw defendant ^{Murphy} ~~Poole~~ sign the register at a hotel at 74 Turk street, under the false name of J. A. Spencer (Tr. pp. 107-109).

The letter of May 19, 1913, heretofore referred to, was addressed to San Francisco, and mentions a prospective trip to San Francisco in the immediate future.

Again, the testimony is clear that ^{Murphy} ~~Poole~~ on September 13, 1913, purchased a ticket and paid excess charges to the amount of \$17.02 on two trunks from Trinidad, Colorado, to San Francisco, and that these trunks were Poole's trunks and that abundant

evidence remained of deposits of opium to show that opium had been a part of its contents.

Murphy's The testimony is ample that these trunks were ~~Public's~~; his keys fit the locks thereon, and that opium labels and bogus opium cans were found therein.

Further, that these trunks were carted about from hotel to hotel, and the circumstances warrant the belief that the black grip was used to take the opium out for sale and distribution.

Lastly, what was the defendant doing locked up with the Chinese at 30 Waverly Place on September 15, 1913; why deny ownership of the keys and papers conclusively shown to have been his property; why scatter them over the floor and throw them away? Why was he locked therein at all? What was the \$1395 in bills for?

Of course it was a meeting to settle up an opium transaction.

Many other circumstances not necessary to dwell upon show beyond question, a gigantic conspiracy to perpetrate deliberate violations of the opium act. It is not surprising that the jury was so prompt in their verdict, and the court also swift in dealing out justice in this case. Total moral depravity of these defendants is absolutely clear.

I need not dwell further, except to say that counsel in his brief admits the overt act of purchasing the ticket and this, it would seem, is sufficient (Brief p. 17). But counsel argues that we do not

show formation of conspiracy in May, 1913. This of course is unnecessary so long as the conspiracy was within the Statute of Limitations and before the return of the indictment.

It is next insisted that because no direct evidence appears as to what defendant Poole did with the four cases of opium received at Nogales, and delivered as per instructions from Bank of Juarez, that this fact is fatal to a conviction on the first count.

How does such a conclusion follow?

Under a conspiracy charge it is not even necessary to prove that a single tin of opium was ever bought or sold. Suppose it be admitted that these cans were retaken from the border of the United States to the interior of Mexico, that fact would not render the evidence insufficient.

In other words, without an actual importation of this particular opium, sufficient evidence remains for a conviction.

The facts in this connection are however, that this opium was purchased through the Bank of Juarez, and shipped from the Port of Manzanillo to Nogales and it is not reasonable to suppose that the goods were again sent to the interior of Mexico, unless to evade detection. The purpose without doubt was to enter the goods for consumption in the United States (Tr. p. 75).

But counsel say that possession of this opium was the only support the charge of the court had in

reference to possession, and therefore the instruction was unwarranted.

I have already called attention to the fact that this portion of the charge was not excepted to nor is it in the assignment of errors.

Moreover, the facts proved in regard to the Nogales opium were a sufficient foundation for the charge in our opinion. Further, the proof in regard to the trunks at all times in his possession, was sufficient to show that with the knowledge of defendant ~~Butte~~ ^{Murphy}, the trunks had contained and did in fact contain deposits of opium.

It is, we take it, unnecessary to answer counsel's contention that possession not having been shown in the United States of the four cases of Nogales opium, that the overt act predicated thereon, fails for the reason that the overt act of buying the ticket, etc., at Trinidad, is not disputed. So also is the overt act about moving the trunks.

We therefore leave this branch of the case with full confidence that the jury were warranted in their verdict under the evidence.

NEWLY DISCOVERED EVIDENCE.

It is contended that the affidavits presented (Tr. pp. 210-222) showed facts from which an abuse of discretion by the court below may be decided by this court as a matter of law.

First, no diligence whatever is shown and no reason whatever appears why this testimony was not produced at the trial, and no assurance is given that it could at any time be produced. But we think the facts, if admitted in evidence, could not have changed the result. The affidavits of Geo. G. Sauer, a resident of El Paso, and Paulino Fontes, are to the effect that the cases of opium were shipped by Poole to Cananea, Mexico, but the affidavits nowhere state whose opium this was, nor who paid for it, nor what became of it, nor whether it was imported after reaching Cananea, to the United States.

It would seem that common fairness to the court would have required that some showing be made to the court as to what these packages were, what the defendants' connection with them was, and what became of them.

The affidavit of Louise Lorraine was simply cumulative to testimony at the trial that witness Louis Sang stated to defendant's attorney that his purchases of opium from defendants had not obtained since the year 1909.

The other affidavits are that defendant in the opinion of affiants, was not out of El Paso, Texas, during December, 1912, and January and February, 1913.

How this, if it were a fact, can affect the situation, we cannot see. But if it could, it is common knowledge that an alibi covering three months

could not with any certainty be testified to by a witness unless the parties were tied or handcuffed together.

RULINGS ON ADMISSION OF EVIDENCE.

Counsel cite no authorities under this head and make no argument not embraced in their argument as to sufficiency of evidence to convict.

We think the rulings set forth are so manifestly correct that to consume further time is unnecessary.

MOTION TO ACQUIT AND MOTION IN ARREST OF JUDGMENT.

If the evidence be sufficient to convict and if the affidavits of newly discovered evidence do not show an abuse of discretion on the part of the court, it is unnecessary to further discuss these topics.

CONCLUSION.

It is offenders of the kind the defendants are shown to be that should receive the swiftest and most severe punishment.

These men are guilty and the conviction was in our opinion without substantial or any error in the proceedings and we submit that cause ought to be affirmed.

Dated, San Francisco,

March 15, 1915.

JOHN W. PRESTON,

United States Attorney,

Attorney for Defendant in Error.

United States Circuit Court
of Appeals

For the Ninth Circuit.

THOMAS ANDREWS, alias THOMAS
J. MURPHY, and GEORGE POOLE,
alias GEORGE MOORE,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AME-
RICA,

Defendant in Error.

Reply Brief for Plaintiffs in Error

WM. F. ROSE and

BRUCE GLIDDEN,

Attorneys for Plaintiffs in Error

Filed this day of April, 1915

Frank D. Monkton, Clerk,

By

Deputy Clerk.

APR 3 - 1915

F. D. Monkton,

No. 2508.

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Reply Brief for Plaintiffs in Error

Replying to the brief filed by the attorney for Defendant in Error, we desire to briefly touch upon first, the statements therein contained which are erroneous and rectify the same; second, to comment on such points which we consider need to be controverted, or explained; third, to reiterate our original position as set forth in our opening brief.

On page 10 of the said brief filed in behalf of Defendant in Error, paragraphs 2, 4 and 6 on said

page and paragraph 1 on page 11, the reference is to Andrews or Murphy instead of Poole as therein set forth. Further on page 11 in the last paragraph on said page counsel for defendant in error states: "I need not dwell further, except to say that counsel in his brief admits the overt act of purchasing the ticket, and this it would seem is sufficient (Brief, p. 17)".

It will be seen by referring to our original brief that we make no such admission. What we do say is that certain circumstantial evidence was adduced during the trial to the effect that Andrews, or Murphy, as he is known, did come from Trinidad to San Francisco. We further state in this connection that there is no proof that he had contraband opium in his baggage.

Counsel for Defendant in Error in his argument on pages two and three of his brief does not in our opinion fully grasp our point. It is our contention that under the theory assumed by the pleader in drawing the indictment in this case, it would be possible to charge a conspiracy to import opium, a further conspiracy to receive opium after importation, a further conspiracy to transport opium, a conspiracy to buy or sell the same, and a number of other charges might be predicated on the same theory, and each one be a separate and distinct conspiracy; further, that the testimony adduced during the trial under the same set of overt acts in this manner might be applied to a dozen counts, and by cumulation of the penalty a defendant might be

subjected to twenty or more years of penal servitude. This syllogism carried to its logical conclusion would be a *reductio ad absurdum*. Our contention is that there is either one conspiracy to violate the opium act, to-wit, the Act of February 9, 1909, and the direct crime of the substantive offense resulting from a violation of the said act, and further that if the Government, Defendant in Error, desires to prosecute an action against the plaintiffs in error there must be charged first, a distinct violation of section 5440 of the United States Statutes, also set out in substance in section 37 of the Penal Code of the United States, and second, in a separate and distinct count in the indictment a charge alleging in direct, concise and specific terms a violation of the opium act itself. There is no question but that there may be a conspiracy to commit an act prohibited by the United States Statutes and also that where the acts complained of are similar in their nature that there may be charged in a separate count in the same indictment a violation of the act itself. The objection which we have to the indictment itself is that it purports to charge a conspiracy in the first count to import opium, and in the second count a conspiracy to transport and sell opium after importation, with four indential overt acts in support of two alleged conspiracies, when as a matter of fact if any crime is committed there can be in the very nature of the offense as charged but a single conspiracy, to-wit, that of confederating and conspiring together to violate the provisions of the Act of February 9,

1909, and if, as charged in said indictment all the acts and deeds of plaintiffs in error in carrying out said conspiracy were continuous, we maintain there can be but one single conspiracy and not two conspiracies as the said indictment attempts to set forth. Further, if there be but one conspiracy and all acts done by the plaintiffs in error were continuous and for the purpose of carrying out their original alleged confederation, then in the very nature of the said acts it can be seen that there is, if anything, but a single conspiracy, and not two. If this be so, then we maintain that the indictment is defective. Just at this point a pertinent inquiry arises, namely, if, as we contend, but one conspiracy exists, then under which count of the indictment as it stands is the conspiracy to be taken as charged? Further, assuming for the sake of the argument only that a conspiracy has been proven, then under which count has it been proven, that is to say, if this matter were presented to the jury in the form of a question thus, "You may only find the defendants guilty under one count, then under which count will you find them guilty"? This question is now impossible of an answer. Therefore we contend that plaintiffs in error are entitled to a reversal. But we have a further objection to make, viz., that in neither count of the said indictment is there a violation alleged of the provisions of the opium act of February 9, 1909, in such form and manner as is required by law to fully charge a separate and distinct offense. Under section 1024 of the Revised Statutes which has already been quoted by counsel

for Defendant in Error as well as by counsel for plaintiffs in error in their original brief, it will be seen that crimes of the same class may be properly joined in separate counts in the same indictment. The very fact that there is such a provision in the Revised Statutes in our opinion makes it clear that the means have been provided whereby clarity and conciseness may be obtained, and that such is recognized by direct statutory enactment. It will be seen by close analysis of the very case cited by counsel for Defendant in Error on page 5 of his brief that the offenses alleged were for acts connected together but set forth in different counts in the same indictment. In the case which we have cited in our opening brief, to-wit, U. S. vs. Lancaster, 44 Fed. Rep. 885, 894, the rule is announced that counts charging a conspiracy, and also the offense committed in pursuance thereof may be joined. This particular case and also the case of Logan vs. U. S., 144 U. S. 263, 295, cited by counsel for defendant in error on page 5 of his brief, are cases in which Sections 5508 and 5509 of the Revised Statutes are involved and in both instances in these two cases there was a conspiracy to interfere with certain rights of the individual, and growing out of said conspiracy a murder was committed, which was a direct violation as we have stated of said sections last above named. These two sections are construed together, and provide punishment for a conspiracy, of this kind, and further punishment for a crime committed in furtherance of said conspiracy. In these two cases which we have just

cited it will be seen that in both indictments there was a full and complete allegation and statement charging not only conspiracy, but the crime of murder, as required by law. In this present case under discussion, an analysis of the indictment we maintain does not show any such compliance with the requirements of good pleading, and as it is the foundation upon which both Defendant in Error and plaintiffs in error must stand, we again insist that these plaintiffs in error should have been permitted to file a demurrer to the indictment in order that the issues might have been properly joined, and that at the trial of the case a proper and orderly defense might have been interposed, first, to a conspiracy charge of violating the opium act, and second, to a direct charge of violating the opium act itself, and that both charges should have been set forth in separate and properly alleged counts in the same indictment.

On pages 6 and 7, the brief of counsel for Defendant in Error touches upon the instructions given by the court to the jury. Our position, which we have already set forth in our opening brief, is, that the instructions complained of having been given by the court to the jury, which said jury had before it certain evidence assuming the existence of certain alleged opium in Nogales, Mexico, and further that said alleged opium was brought across into the United States from Mexico, and thence to San Francisco, were wrongfully given. The jury must have been so impressed with the fact that no evidence was offered by these defendants in the court below,

plaintiff in error here, to explain the said alleged possession of opium in Nogales, Mexico, and this fact taken with the instructions that possession unexplained was an evidence of guilt, it was only natural for the jurors' minds to arrive at a conviction upon which to predicate a verdict of guilty without any further consideration whatsoever. Our position is that it is a very material difference whether or not there is a conspiracy to violate the opium act or a direct violation of the same. And while the instructions complained of would be perfectly proper in a charge made pursuant to a proper indictment for a violation of said opium act, the charge is entirely improper when applied to a conspiracy under Section 37 of the Penal Code, to-wit, an agreement to violate the Act of February 9, 1909. So far as the brief of counsel for Defendant in Error on pages 7 to 13 is concerned, we again assert what we have heretofore set out in our brief, viz., that much of the evidence introduced was improperly allowed to go before the jury because there was no proof of the importation of opium, and if the theory of the government is that these plaintiffs in error are being tried for a violation of the opium act without proof of importation, then the evidence which was introduced is surely erroneously presented to the jury over the objections of counsel and properly excepted to, as shown by the record.

On page 12 of said brief counsel for Defendant in Error states that it is not necessary to show the formation of a conspiracy in May, 1913. Further on in paragraph 3 on the same page, he further states that

under the conspiracy charged it is not even necessary to prove that a single tin of opium was ever bought or sold. We maintain that under the decisions quoted in our brief, that in order to convict on the charge of conspiracy there must be proven three particular elements, first, the unlawful agreement or confederation, second, the overt act, and third, that the defendants were the conspirators (pages 11, 12, opening brief, plaintiffs in error and authorities cited on page 12) and if these three elements are not combined, conviction is wrongful. Said counsel also in discussing the evidence, on page 8 of his brief argues that Louis Sang sent certain money to Poole for the purchase of twelve cans of opium. It is shown by the testimony of Sang that he never received any opium from Poole at any time subsequent to said date. Further than that, all matters pertaining to transactions between Poole and Sang prior to May 1, 1913, have nothing whatsoever to do with this case. In passing, we might refer to the statement made by counsel on page 13 of his brief, in paragraph 2, relative to the question of no proper exception having been taken to the charge to the jury at the proper time. We believe that where there is a substantial violation of the rights of a defendant, and that where some foundation is laid, it is proper for this court to consider the matter on an appeal. See *Wiborg vs. United States*, 163 U. S. 658, as quoted in our opening brief on page 26.

On the question of newly discovered evidence we are not in a position to read the mind of counsel trying the case, nor are we trying to advance any reas-

on why the evidence suggested by the affidavits of Sauer and Paulino Fontes and the others was not produced at the trial. We do, however, maintain that in connection with the rest of the evidence in this case and the instructions of the court to the jury, that this evidence was such that it would have explained to the jury what became of said cases of alleged opium, and would have made a vast difference in the result of the trial.

In closing our case we desire again to advert to our original position and to amplify it a little further by asking, If the conspiracy statute provides a punishment of two years, and if the plaintiffs in error were convicted of a conspiracy, could the punishment be more than two years when it is not shown whether they were convicted of the commission of a direct violation of the opium act itself as well as of a conspiracy to violate the provisions of said act? We would respectfully suggest to the court these two things, first, was the indictment sufficiently clear and did it charge one or more offenses in a proper manner; second, did the defendants in the lower court, the plaintiffs in error, have a fair and impartial trial? All of which we respectfully submit.

Dated, San Francisco, Cal., April 2, 1915.

WM. F. ROSE and BRUCE GLIDDEN,
Attorneys for Plaintiffs in Error.



